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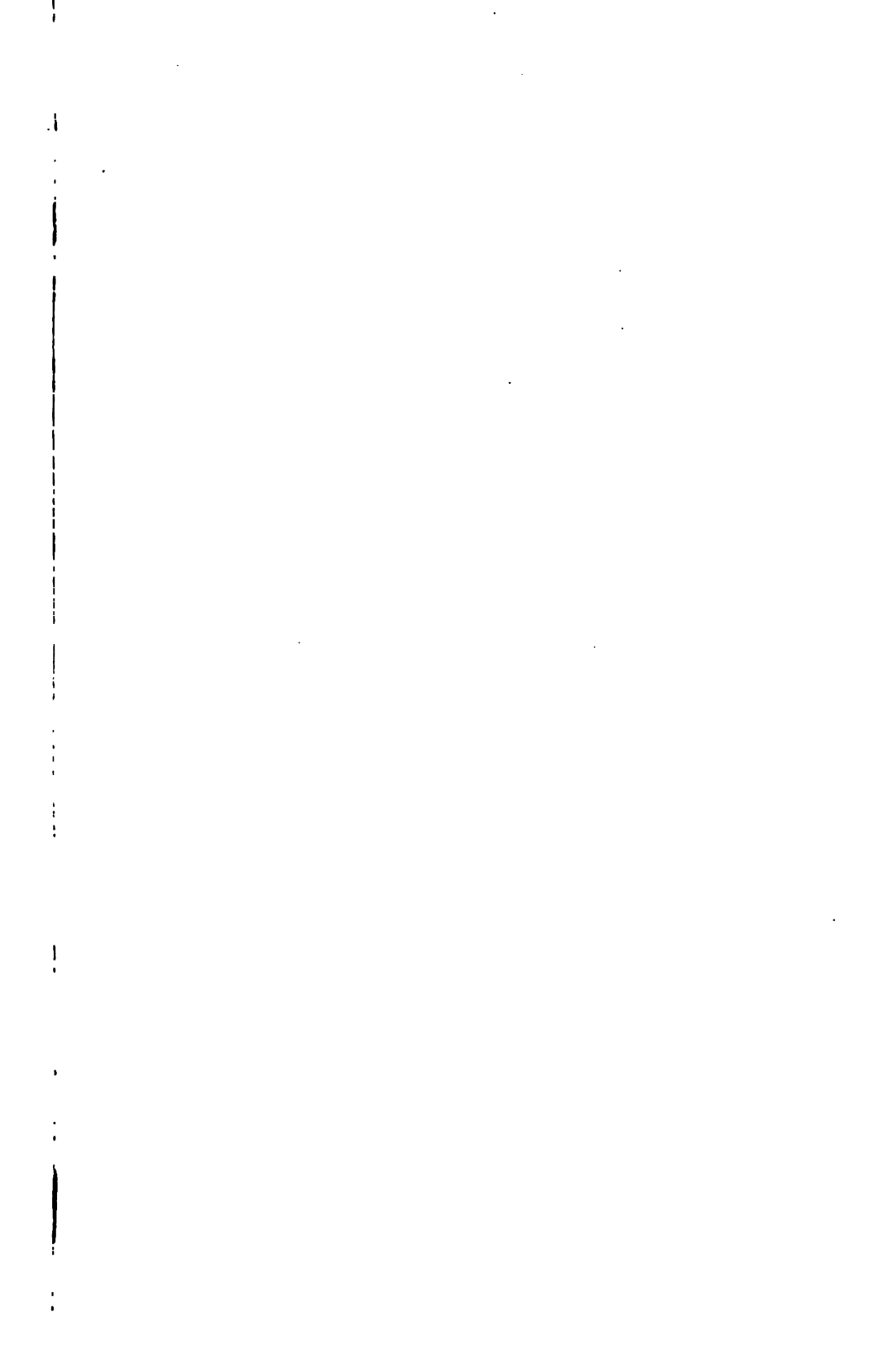
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A TREATISE ON

# The Federal Employers' Liability and Safety Appliance Acts

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BY

W. W. THORNTON  
OF THE INDIANAPOLIS BAR

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CINCINNATI, OHIO  
THE W. H. ANDERSON COMPANY  
1909

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## PREFACE.

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The provisions and scope of the Federal Employers' Liability Act of April 22, 1908, are but little known to the average lawyer. It is a very important statute, giving a remedy to employees of common carriers by railroad when injured while engaged in interstate commerce where none before existed. All questions of fellow servant in such instances are wiped out at one sweep of the legislative pen; and all questions of contributory negligence are so modified as to allow a recovery without stating the negligence of the employee did not contribute to his injury—the sole question being the amount of his recovery. These are far-reaching provisions. The provision concerning contributory negligence introduces the law of Comparative Negligence as, in a measure administered under the provisions of the Code of Georgia, and, in a measure, as administered in the State of Illinois. In only two states of the Union is the law of Comparative Negligence known to the legal profession. But the rule prevailing in the law of Admiralty concerning contributory negligence more closely approaches the rule concerning the apportionment of damages provided for in this Federal Statute.

The decisions in these two states have been examined and cited, and their respective bearings noted. It is believed that this will be of value to the profession.

The Federal Automatic Coupling Act or Safety Appliance Act has not been separately nor adequately treated in any work, although it has been in force over fifteen years. It is of paramount importance to railroad companies engaged in Interstate Commerce, as well as employees injured by reason of the failure of such companies to comply with its provisions with respect to the equipment of their cars.



## PREFACE

Necessarily a discussion of Interstate Commerce is required so far as it pertains to the provisions of these two statutes and to show when it does and when it does not apply.

It is believed that a work on these two statutes will be welcomed by the bar.

W. W. THORNTON.

*Indianapolis, Ind., April 1, 1909.*

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**PART I.**

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**Federal Employers' Liability Act**





# Federal Employers' Liability and Safety Appliance Acts

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## CHAPTER I.

### ABOLITION OF FELLOW SERVANT RULE.

#### SECTION.

1. Object and purpose of Act of 1908.

#### SECTION.

2. Rule of fellow servant in European countries.

3. Quebec and Mexico.

**§ 1. Object and Purpose of Act of 1908.**—On the floor of the Senate, Senator Doliver thus explained the object and purpose of the Act of 1908:

“First, it modifies the old law of the negligence of co-employees. The old law, which took root in the United States two generations ago, was to the effect that an employe injured by the negligence of a fellow workman could not recover. \* \* \* The proposition was that an employe injured by the negligence of a fellow servant could not recover. This bill abolishes that doctrine, and gives the employe the right to recover for injuries arising from the negligence of his fellow workmen. That is the first proposition.

The second proposition modifies the law whereby in other generations workmen were held by the court to assume the risks arising from defective machinery. That was an

inheritance, I reckon, of the common law, and at the time the courts originally established the doctrine, it had some sense in it and a little justice. There was some reason why a man working with simple machinery should look to it that the machinery with which he worked was in good order. But the doctrine is obsolete as applied to the present day occupations of those workmen who were employed by the common carriers of the world. It would require a brakeman to know all about the machinery of a freight train, though it may be half a mile long, as he goes out upon his day's work. Everybody with a moderate sense of justice must see that the common law applicable to the assumption of risks for deficient machinery has no rational application to the complex industrial concerns of our own time.

In the third place, this proposed statute modifies radically the law of contributory negligence. As administered by our courts, it has been uniformly held that an employe suffering an injury to which his own negligence contributed, cannot, by reason of that participation in the injury, have any recovery at law. The proposed statute liberalizes the doctrine of the law. It is based upon the theory that where an injury occurs partly by reason of the negligence of the employer and partly by reason of the negligence of an employe, the jury ought to determine what portion of the injury arises from the negligence of the plaintiff, and take away from the sum total of his damage allowed that part which can properly be apportioned to his own negligence. That principle has been called in some of the books the doctrine of comparative negligence.

In the fourth place, the proposed bill undertakes to modify somewhat the common law applicable to certain agreements or contracts made between employers and their workmen, in which the latter agree, in consideration of some form of insurance or indemnity fund, to give up the right to sue in the courts. It has been held, as a matter of public policy, that a workman cannot contract himself out of his right or the rights of his legal representatives to recover

for damages. That is to say, the courts have held that it is against public policy to sustain a contract by which a workman, merely by consideration of his wages and his employment, agrees to withhold any claims for damages in case of his injury. But many insurance societies have grown up in connection with the protection of our railways, which not only undertake to pay a man for damages arising out of injuries, but have also certain other features in the nature of sick benefits and other insurance. They have been regarded by the courts as valid and binding agreements. This proposed law means simply that where a workman sues for injury for which he is entitled to recover, he shall not have his recovery defeated by reason of one of these insurance agreements; but it also says that in case the railway has contributed anything to the insurance fund which he has enjoyed, the amount that the railway has contributed shall be deducted in the calculation of the damages which he is entitled to recover.

These are the four propositions contained in this bill, and I have an idea that there is not a member of the Senate who does not recognize the equity and justice involved in all four of them.

The fact is, we have been at least a generation behind the whole world in the adoption of the doctrines and principles to which I have referred. Outside of England, there has not in modern times been a country in Europe that does not now give its workmen all the advantages that are provided by this bill. There is hardly an American state in these recent years which has not taken this step forward in industrial justice.

The codes of nearly all the countries in Europe were derived, directly or indirectly, from the civil law, and wherever the civil law crossed the water, these doctrines which we are introducing into the United States Courts in this bill have found acceptance. This is so in the courts of Quebec.

he recent English compensation acts illustrate the present day reaction against the severity of the common law. The

fact is that every country in the world has been engaged in the careful study of the relations of its working millions to its prosperity, and to its civilization, and this bill proposes to do for workmen seeking the protection of the courts of the United States, what the enlightened jurisprudence of all the modern nations has already done for their workmen under similar conditions.”<sup>1</sup>

**§ 2. Rule of fellow servant in European countries.**—The rule of the common law respecting the liability of the master to his servant for damages occasioned by an injury inflicted by the negligent act of his fellow servant, does not obtain in any European countries having the Civil Law for the basis of their own laws. The Code Napoleon made the employer answerable for all injuries received by his workmen,<sup>2</sup> and this code is still in force in Belgium and Holland. In Italy and Switzerland, the doctrine of fellow servant does not prevail.<sup>3</sup> Nor does it in Germany and Austria,<sup>4</sup> not in the latter country at least since 1869.<sup>5</sup> In 1888, England adopted a statute which abolished the rule of fellow servant with reference to the operation of railroad trains, and in 1897 it extended the law so as to apply to many of the

<sup>1</sup> 60 Cong. Record, 1st Sess., p. 4527.

It was evidently not the purposes of Congress to prevent negligence on the part of interstate employes; for if that had been the purpose it would have provided for the liability of an engineer or the railroad company for an injury to a passenger on a highway, struck through the negligence of the interstate employe. Evidently the purpose of the Act is to create a right of action against a railroad company in favor of an employe for injuries sustained by him while engaged in interstate commerce.

It may be remarked that there

is, strictly speaking, no Federal law of negligence, the Federal courts simply applying the law of negligence as a part of the state law where the injury was occasioned. This is true of the doctrine of *respondeat superior*. It is considered that this act for the first time creates a substantive right in favor of one party against another, based on the proposition that there is a right of action.

<sup>2</sup> Dalloz, 1841, 1st partie, p. 271.

<sup>3</sup> 5 Law Quarterly Review, 184.

<sup>4</sup> 9 Jurid. Rev., p. 271.

<sup>5</sup> Cong. Record, 60 Cong. Record, 1st Sess., p. 4435.

hazardous employments of that country.<sup>6</sup> In the English Workman's Compensatory Act of 1906,<sup>7</sup> contributory negligence does not defeat the workmen's rights to recover damages, or compensation, but "if it is proved that the injury to the workmen is attributable to the serious and willful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disability, be disallowed."<sup>8</sup>

**§ 3. Quebec and Mexico.**—The doctrine of fellow servant does not obtain in Quebec, in that respect following the French law yet there in force;<sup>9</sup> but in Ontario and the remainder of British North America, the rule does yet obtain.<sup>10</sup> In a case brought in a Circuit Court of the United States to recover damages for an injury received in the Province of Quebec, the court enforced the doctrine concerning fellow servant that prevails in that province.<sup>11</sup> In Mexico, the master is liable to his servant for an injury caused by the negligence of a fellow servant.<sup>12</sup>

<sup>6</sup> See Appendix C.

<sup>7</sup> 6 Edw. VII Cap. 53.

<sup>8</sup> See Ruegg's Employer's Liability, 338. See also *Thomas v. Quartermain*, 18 Q. B. Div. 693; *Griffiths v. Dudley*, 9 Q. B. Div. 357; *Stuart v. Evans*, 31 W. R. 706.

<sup>9</sup> *Canadian Pac. Ry. v. Robinson*, 14 Can. S. C. 105, 115; *City Demolombe*, Vol. 31, No. 368, and *Sourdat*, Vol. 2, No. 911. See *Fulmer v. Grand Trunk Ry. Co.* 1 Low Cas. L. J. 68; *Bourdeau v. Grand Trunk Ry. Co.* 2 Low Cas. L. J. 186, and *Hall v. Canadian, etc.*, Co. 2 Montreal L. N. 245.

<sup>10</sup> "According to the French law common employment is no defense, and does not exonerate the employer from liability for the negli-

gence of a servant who may by his negligence have caused an accident from which another servant has suffered." *Asbestos, etc., Co. v. Durand*, 30 Can. S. C. 285; *The Queen v. Grenier*, 30 Can. S. C. 42; *The Queen v. Fillion*, 24 Can. S. C. 482, affirming 4 Can. Exch. 134; *Belanger v. Riopel*, 3 Montreal S. C. 198.

<sup>11</sup> *Boston, etc., R. Co. v. McDuffey*, 25 C. C. A. 247; 51 U. S. App. 111; 73 Fed. Rep. 934.

<sup>12</sup> *Mexican Cent. R. Co. v. Knox*, 114 Fed. Rep. 73; 52 C. C. A. 21; *Mexican Cent. R. Co. v. Sprague*, 114 Fed. Rep. 544; 52 C. C. A. 318. See also *Mexican Cent. R. Co. v. Glover*, 107 Fed. Rep. 356; 46 C. C. A. 334.

## CHAPTER II.

### CONSTITUTIONALITY OF STATUTE—EFFECT ON STATE LEGISLATION.

#### CONSTITUTIONALITY.

##### SECTION.

4. Power of Congress to increase liabilities of master.
5. Authorizing a recovery for negligent act of fellow servant.
6. Basis of rule of master's non-liability for negligence of a fellow servant.
7. Validity of statute allowing a recovery for an injury occasioned by a fellow servant's negligence.
8. Validity of statute as to past contracts of employment.
9. Limiting statute to employees of railroad companies—Fourteenth Amendment.
10. Validity of statute classifying instrumentalities.

##### SECTION.

11. Power of Congress to enact statute of 1908.
12. Invalidity of Act of 1906.
13. The parts of the Act of 1906 rendering it invalid.
14. Congress can only legislate concerning interstate commerce.
15. Effect of Act of 1908 on State legislation.
16. Effect of Act of 1908 on State legislation, continued.
17. Result of decisions.
- 17a. Must interstate employee bring his action on the statute.
18. Act of 1906, validity in District of Columbia and Territories.
19. Construction of statute.

#### § 4. Power of Congress to increase liabilities of master.—

The validity of statutes increasing or changing the liability of a master to his servant, is one that presents itself at an early stage in the discussion of the question of his liability under this Federal Employers' Liability Act. This question presents itself in three aspects:

*First*—The power of Congress to change or modify the liability at common law of a master to his servant, concerning his liability for the negligence of his fellow servant.

*Second*—The power of Congress to enact a law author-

izing a recovery when the servant has been guilty of negligence contributing to his injury.

*Third*—The power of Congress to legislate upon any phase of the relation of master and servant.

**§ 5. Authorizing a recovery for negligent act of fellow servant.**—In discussing the power of a Legislature to change the law with reference to the liability of a master to his servant—not taking into consideration that Congress must limit the scope of its legislation to masters and servants engaged in interstate commerce—decisions of state courts are by analogy available. The doctrine that a master is not liable to his servant for an injury inflicted upon him by the negligence of his fellow servant is a rule of law enunciated and enforced by the courts without any legislative sanction, adopted by them from a supposed or assumed public policy. This rule was announced in England in 1837,<sup>1</sup> in South Carolina in 1838,<sup>2</sup> in Massachusetts in 1842,<sup>3</sup> and in Pennsylvania in 1854.<sup>4</sup> In Massachusetts, the conclusion reached was upon what had been decided in South Carolina and England.<sup>5</sup>

**§ 6. Basis of rule of master's non-liability for negligence of fellow servant.**—In South Carolina, the basis for the rule assumed by the Supreme Court, holding the master not liable to his servant for injuries inflicted by the negligence of his fellow servant, is that the injured servant had entered into a joint undertaking with his fellow with a common employer or master, each having stipulated for the performance of his several part; and as each of them was not liable to the master for the conduct of the other, conversely the master was not liable to one for the conduct of the other,

<sup>1</sup> *Priestly v. Fowler*, 3 M. & W. 1.

<sup>4</sup> *Ryan v. Cumberland Valley R. Co.* 23 Pa. St. 384.

<sup>2</sup> *McMurray v. So. Car. R. R. Co.* 1 McMullen, 385; 36 Am. Dec. 268.

<sup>3</sup> The rule was adopted in New York in 1851. *Coon v. Utica, etc.*, R. Co. 5 N. Y. 492.

<sup>5</sup> *Farwell v. Boston, etc., R. Co.* 4 Metc. 49; 38 Am. Dec. 339.



but was, when he was not at fault, only liable to his servant for his wages.\*

In Massachusetts the question was put upon the ground of implied contract,—that the contract of employment implied upon the part of the servant that he assumed all risk arising from the negligence of his fellow; and this exemption was declared to rest upon considerations of public policy. "Where several persons," said the court, "are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectively secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other." Speaking of servants employed in different departments, and applying the rule to them, the court further said: "When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary the circumstances of each case.<sup>7</sup> The master is not exempt from liability, in such case, because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of any

\*Murray v. So. Car. R. Co. 1 McMul, 385; 36 Am. Dec. 268.

<sup>7</sup> Was not this language prompted by an unwillingness of the court to undertake an investiga-

tion into the conditions of each case, and award or withhold damages as the facts of each particular case would demand as a matter of justice and right?

one but himself;<sup>8</sup> and he is not liable in tort as for the negligence of his servant, because the person suffering does not stand in the relation of a stranger, but is one whose rights are regulated by contract, express or implied.<sup>9</sup> In Indiana, in 1855, the Supreme Court said: "It is considered that public policy requires that servants engaged in common employment shall not have an action against their principal for injuries resulting from the negligence of one or more of such servants, because the tendency of such a doctrine is to make them anxious and watchful and interested for the faithful conduct of each other, and careful to induce it, while the opposite doctrine would tend in a different direction.<sup>10</sup> The safety and welfare of the public, therefore, demand the establishment of the principle of the non-liability on the part of the employer in such case;<sup>11</sup> while, when established, it can work no injury to the servant,<sup>12</sup> because his entering upon the service is voluntary,<sup>13</sup> is with a knowledge of its hazards, and with a power and right to demand such wages<sup>14</sup> as he should deem compensatory.<sup>15</sup> The doctrine of *Priestly v. Fowler*<sup>16</sup> was stated by Baron Alderson in a subsequent case in these words: "They have both engaged in a common service, the duties of which impose a certain risk on each of them, and in case of negligence on the part of the other, the party injured knows that the negligence is that

<sup>8</sup> Where was the authority to say there was an implied contract? Did not the court merely assume there was such contract?

<sup>9</sup> *Farwell v. Boston, etc., R. Co.* 4 Metc. 49; 38 Am. Dec. 339.

<sup>10</sup> This is a strange assumption in view of the law on the subject in Continental Europe.

<sup>11</sup> Experience of long years' duration shows that the public in Western Continental Europe are as safely cared for as in England and much more so than in America, as against the carelessness of servants.

<sup>12</sup> Experience shows that it does, until legislature after legislature has been compelled to modify the harsh rule announced by these decisions.

<sup>13</sup> True only in a limited sense, because of the pressure that modern civilization thrusts upon the laboring man to secure for himself and family the sustenance of life.

<sup>14</sup> The supply of labor fixes the wages.

<sup>15</sup> *Madison, etc. R. Co. v. Bacon*, 6 Ind. 205.

<sup>16</sup> 3 Mees & Wels, 1.

of his fellow servant and not of his master." "He knew when he was engaged in the service that he was exposed to the risk of injury, not only from his own want of skill and care, but also from the want of it on the part of his fellow servant, and he must be supposed to have contracted on the terms that, as between himself and his master, he would run the risk, 'a risk which he' must be taken to have agreed to run when he entered into the defendant's service." "The principle is," Baron Alderson again said, "that a servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow servant, whenever he is acting in the discharge of his duty as servant of him who is common master of both."<sup>17</sup>

**§ 7. Validity of statute allowing a recovery for an injury occasioned by a fellow servant's negligence.**—From an examination of the cases quoted and cited in the foregoing section, it will be seen that the cases rest upon practically two grounds: That it is against public policy to allow a servant to recover damages occasioned by the negligence of his fellow

<sup>17</sup> *Hutchinson v. York, etc., R. Co.* 5 Exch. 343; 14 Jur. 837; 19 L. J. (Exch.) 296.

The English rule was forced upon the courts of Scotland by the decision of the House of Lords in *Wilson v. Merry*, L. R. 1 Sc. & Div. App. Cas. 326; 19 L. T. (N. S.) 33.

For a few of the hundreds of cases upon this question, see *Wabash, etc., R. Co. v. Conkling*, 15 Ill. App. 157; *Stucke v. Orleans R. Co.* 50 La. Ann. 188, 23 So. Rep. 342; *Ackerson v. Dennison*, 117 Mass. 407; *World's Columbian Exposition v. Bell*, 76 Ill. App. 591; *Doyle v. White*, 9 App. Div. (N. Y.) 521; 41 N. Y. Supp. 628; 75 N. Y. St. Rep. 628; *Hicks*

*v. Southern R. Co.* 63 S. C. 559; 41 S. E. Rep. 753; *Barton's Hill Coal Co. v. Ried*, 3 Macq. H. L. Cas. 266; *Baltimore, etc., R. Co. v. Colvin*, 118 Pa. St. 230; 12 Atl. Rep. 337; 20 W. N. C. 531; *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377; 28 L. Ed. 787; 5 Sup. Ct. Rep. 184; *Latremouille v. Bennington*, 63 Vt. 336; 22 Atl. Rep. 656; 48 Am. & Eng. R. Cas. 265; *Walton v. Bryn Mawr Hotel Co.*, 160 Pa. St. 3; 28 Atl. Rep. 438; *Olsen v. Nixon*, 61 N. J. L. 671; 4 Am. Neg. Rep. 515; 40 Atl. Rep. 694; *Jungnitsch v. Michigan, etc., Co.* 105 Mich. 270; 63 N. W. Rep. 296; 2 Det. Leg. N. 107; *Elwell v. Hocker*, 86 Me. 416; 30 Atl. Rep. 84.

servant, and the other is that he has by his contract for service impliedly assumed the risk of such association or of his fellow servant's negligence. Such being the case, it readily follows that the legislature can change the rule of public policy or provide that the implied undertaking shall not be a part of the contract for service. In the usual employers liability statutes this is done only to a limited extent, by providing in what particular instance the servant may recover for injuries occasioned by his fellow's negligence, or by providing in what particular instances the relation in law of fellow servant shall not be deemed to exist. Such statutes have been universally upheld, both by the state and Federal courts.<sup>18</sup> This power has been stated thus tersely: "It is

<sup>18</sup> *McAunick v. Mississippi etc.*, R. Co. 20 Iowa, 338; *Bucklew v. Central, etc.*, R. Co. 64 Iowa, 611; *Rose v. Des Moines, etc.*, R. Co. 39 Iowa, 246; *Kansas, etc.*, R. Co. v. Peavey, 29 Kan. 169; *Missouri Pacific R. Co. v. Mackey*, 33 Kan. 298; 6 Pac. Rep. 291; *Attorney-General v. Railroad Cos.* 35 Wis. 425; *Dithberner v. Chicago, etc.*, R. Co. 47 Wis. 138; 2 N. W. Rep. 69; *Herrick v. Minneapolis, etc.*, R. Co. 31 Minn. 11; 16 N. W. Rep. 413 (upholding Iowa statute); *Herrick v. Minneapolis, etc.*, R. Co. 32 Minn. 435; 21 N. W. Rep. 471; *Missouri, etc.*, R. Co. v. Mackey, 127 U. S. 205; 32 L. Ed. 107; 8 Sup. Ct. Rep. 1161, affirming 33 Kan. 298; 6 Pac. Rep. 291; *Minneapolis, etc.*, R. Co. v. Herrick, 127 U. S. 210; 32 L. Ed. 109; 8 Sup. Ct. Rep. 1176, affirming 31 Minn. 11; 16 N. W. Rep. 413; 47 Am. Rep. 771; *Pittsburg, etc.*, R. Co. v. Montgomery, 152 Ind. 1; 49 N. E. Rep. 482; 69 L. R. A. 875; 71 Am. St. 30; *Pittsburg, etc.*, R. Co. v. Lightheiser, 168 Ind. 438; 78 N. E.

Rep. 1033; *Indianapolis, etc.*, R. Co. v. Houghton, 157 Ind. 494; 60 N. E. Rep. 943; 54 L. R. A. 787; *Pittsburg, etc.*, R. Co. v. Ross, 169 Ind. 3; 80 N. E. Rep. 843; *Chicago, etc.*, Ry. Co. v. Pontius, 157 U. S. 209; 39 L. Ed. 675; 15 Sup. Ct. Rep. 585, affirming 52 Kan. 264; 34 Pac. Rep. 739; *Baltimore, etc.*, R. Co. v. Voight, 176 U. S. 498; 44 L. Ed. 560; 20 Sup. Ct. Rep. 385; *McGuire v. Chicago, etc.*, R. Co. 131 Iowa, 340; 108 N. W. Rep. 902; *Hancock v. Railway Co.* 124 N. C. 222; 32 S. E. Rep. 679; *Tullis v. Lake Erie, etc.*, R. Co. 175 U. S. 348; 44 L. Ed. 192; 20 Sup. Ct. Rep. 136; *Railroad Co. v. Thompson*, 54 Ga. 509; *Georgia R. Co. v. Ivey*, 73 Ga. 409; *Georgia R. Co. v. Brown*, 86 Ga. 320; *Georgia R. Co. v. Miller*, 90 Ga. 574; *St. Louis, etc.*, R. Co. v. Matthews, 165 U. S. 1; 41 L. Ed. 611; 17 Sup. Ct. Rep. 243; affirming 121 Mo. 298; 25 L. R. A. 161; 24 S. W. Rep. 591; *Holden v. Hardy*, 169 U. S. 366; 42 L. Ed. 780; 18 Sup. Ct. Rep. 383; affirming 14 Utah, 71; 37

competent for the legislature, in the exercise of the police power, to take steps for the protection of the lives and limbs of all persons who may be exposed to dangerous agencies in the hands of others."<sup>19</sup> In a recent case in Colorado the validity of a statute abolishing the doctrine of co-service as a defense was passed upon and the statute upheld in the following language: "The final and important question is the validity of the co-employee act. It is urged that the act is unconstitutional in that it is in conflict with the fourteenth amendment to the Federal Constitution, because it deprives persons of their property without due process of law. The act in question renders the employer liable for damages resulting from injuries to or death of an employee, caused by the negligence of a co-employee in the same manner, and to the same extent, as if the negligence causing the injury or death was that of the employer. That the act in question may be regarded by some as harsh or unjust, because imposing too great a disability, is not a matter which we can consider in determining its validity by constitutional tests. Whether or not the employer is liable under the act in question must be determined by each particular case based on the provisions of the act. It does not deprive him of any defense to the liability thereby imposed which, under the established rules of law could be regarded as sufficient, save and except his own lack of negligence; but such a defense is not a constitutional right. The law itself, as a rule of conduct, may, unless constitutional limitations forbid, be changed at the will of the legislature. The exercise of the discretion of that branch of the government to enact laws cannot be ques-

L. R. A. 103; 46 Pac. Rep. 756; 14 Utah, 96; 37 L. R. A. 108; 46 Pac. Rep. 1105; St. Louis, etc., R. Co. v. Paul, 173 U. S. 404; 43 L. Ed. 746; 19 Sup. Ct. Rep. 419; affirming 64 Ark. 83; 37 L. R. A. 504; 62 Am. St. Rep. 154; 40 S. W. Rep. 705; Pittsburg, etc., R. Co. v. Collins, 168 Ind. 467; 80

N. E. Rep. 415; Mickelson v. Truesdale, 63 Minn. 137; 65 N. W. Rep. 260.

<sup>19</sup> Indianapolis, etc., R. Co. v. Houlihan, 157 Ind. 494; 60 N. E. Rep. 943; 54 L. R. A. 787. See Tullis v. Railway Co. 175 U. S. 348; 20 Sup. Ct. Rep. 136; 44 L. Ed. 192.

tioned so long as such laws do not conflict with either state or Federal constitutional provisions. No such provisions have been called to our attention which limit the authority of the general assembly to abolish the rule heretofore existing which exempted the employer from liability to employes caused by the negligence of a co-employe, and render him liable to his employes for the negligence of a co-employe. For the purpose of providing for the safety and protection of employes in the service of a common employer, the law making power has the undoubted authority to abrogate the exception to the general rule *respondeat superior* in favor of the employer, and make him liable to one of his employes for damages caused by the negligence of another employe while acting within the scope of his employment, regardless of the fact that such employes are fellow servants." <sup>20</sup>

§ 8. **Validity of statute as to past contracts of employment.**—Where the servant has entered into the employment of a master before the statute has taken effect, but the employment is not for a continuous service—as in the case of a railroad engineer—and after the passage of the statute is in-

<sup>20</sup> *Vindicator, etc., Co. v. Firstbrook*, 36 Colo. 498; 86 Pac. Rep. 313.

For some Georgia cases holding under the Code that a recovery can be had for an injury caused by the negligence of a fellow servant, see *Georgia, etc., R. Co. v. Goldwire*, 56 Ga. 196; *Marsh v. South Carolina, etc., R. Co.* 56 Ga. 274; *Georgia, etc., R. Co. v. Rhodes*, 56 Ga. 645; *Georgia, etc., R. Co. v. Brown*, 86 Ga. 320; 12 S. E. Rep. 812; *Georgia, etc., R. Co. v. Cosby*, 97 Ga. 299; 22 S. E. Rep. 912; *Southern, etc., R. Co. v. Johnson*, 114 Ga. 329; 40 S. E. Rep. 235; *Georgia, etc., R. Co. v. Ivey*, 73 Ga. 499; *Georgia,*

*etc., R. Co. v. Hicks*, 95 Ga. 301; 22 S. E. Rep. 613; *Chandler v. Southern R. Co.* 113 Ga. 130; 33 S. E. Rep. 305.

For a very recent case on this question, see *Kiley v. Chicago, etc., R. Co.* (Wis.) 119 N. W. Rep. 309, and *Haring v. Great Northern Ry. Co.* (Wis.), 119 N. W. Rep. 325.

These last two cases hold that the excepting of office and shop employes of a railroad from the operation of the act does not render it invalid. See *Callahan v. Bridge Co.* 170 Mo. 473; 71 S. W. Rep. 208; 60 L. R. A. 249; 94 Am. St. Rep. 746; *Howard v. Illinois Central Ry. Co.* 207 U. S. 463; 28 Sup. Ct. Rep. 141; 52 L. Ed. 297.

jured by a fellow servant, and he would not have had a right of recovery except for its provisions, he may recover his damages, and such legislation is not retroactive nor does it impair the obligation of a contract.<sup>21</sup> This question came before the Circuit Court for the Northern District of Iowa upon a construction of the act of June 11, 1906,<sup>22</sup> but the court held that the statute in its terms was not retroactive. The question then before the court was whether the act of Congress had taken away a right of action given by an Iowa statute, the cause of action having arisen in 1905; and the court held that the act of 1906 had no retroactive effect, and if it did so have as to take away the cause of action, it would be void.<sup>23</sup>

**§ 9. Limiting statute to employes of railroad companies—Fourteenth Amendment.**—A statute concerning liability of a master to his servant for injuries occasioned by his fellow is not special legislation, nor is it the taking of property without due process of law. "The company calls attention of the court," said Justice Field of the Supreme Court of the United States, "to the rule of law exempting from liability an employer for injuries to employes caused by the negligence or incompetency of a fellow servant which prevailed in Kansas and in several other states previous to the act of 1874, unless he had employed such negligent or incompetent servant without reasonable inquiry as to his qualifications, or had retained him after knowledge of his negligence or incompetency. The rule of law is conceded where the person injured, and the one by whose negligence or incompetency the injury is caused, are fellow servants in the same common employment, and acting under the same immediate action \* \* \* Assuming that this rule would apply to the case presented but for the law of Kansas of 1874, the contention

<sup>21</sup> *Pittsburg, etc., R. Co. v. Lighthouse*, 168 Ind. 438; 78 N. E. Rep. 1033; *Pittsburg, etc., R. Co. v. Lighthouse*, 163 Ind. 247; 71 N. E. Rep. 218, 600.

<sup>22</sup> C. 3073, 34 statute at L. 232.

<sup>23</sup> *Hall v. Chicago, etc., R. Co.* 149 Fed. Rep. 564.

of the company \* \* \* is that the law imposes upon railroad companies a liability not previously existing, in the enforcement of which their property may be taken; and thus authorizes, in such cases, the taking of property without due process of law, in violation of the fourteenth amendment.

\* \* \* The supposed hardship and injustice consist in imputing liability to the company, where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship and injustice, if there be any, exist where the company, without any wrong or negligence on its part, is charged for injustice to passengers. \* \* \* The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine and fixes a liability upon railroad companies, where injuries are subsequently suffered by employees, though it may be by the negligence or incompetency of a fellow servant in the same general employment and acting under the same immediate direction. That its passage was within the competency of the legislature we can have no doubt. The objection that the law of 1874 deprives the railroad companies of the equal protection of the law is even less tenable than the one considered. It seems to act upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and the laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers, are instances of this kind. \* \* \* A law giving to mechanics a lien on buildings constructed or repaired by them, for the amount of their work, and a law requiring railroad corporations to erect and main-



tain fences along their roads, separating them from land of adjoining proprietors so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the fourteenth amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect of both the privileges conferred and the liabilities imposed. \* \* \* But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes as well as the safety of the public."<sup>24</sup> In a subsequent case a like decision was made, where a statute applied only to railroads.<sup>25</sup>

\* *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205; 8 Sup. Ct. Rep. 1161; 32 L. Ed. 107; affirming 33 Kan. 298; 6 Pac. Rep. 291; *Minneapolis, etc., R. Co. v. Herrick*, 127 U. S. 210; 8 Sup. Ct. Rep. 1176; 32 L. Ed. 109, and affirming *Herrick v. Minneapolis, etc., R. Co.* 31 Minn. 11; 16 N. W. Rep. 413; 47 Am. Rep. 771; *Herrick v. Minneapolis, etc., Co.* 32 Minn. 435; 21 N. W. Rep. 471; *Pittsburg, etc., R. Co. v. Montgomery*, 152 Ind. 1; 49 N. E. Rep. 482; 69 L. R. A. 875; 71 Am. St. Rep. 30; *Indianapolis Union Ry. Co. v. Houlihan*, 157 Ind. 494; 60 N. E. Rep. 943; 54 L. R. A. 787.

\* *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150; 17 Sup. Ct. Rep. 255; 41 L. Ed. 666; reversing 87 Tex. 19; 26 S. W. Rep. 985.

See also *Ney v. Des Moines, etc., R. Co.* 20 Iowa, 347; *Deppe v. Chicago, etc., R. Co.* 36 Iowa, 52; *Schroeder v. Chicago, etc., R. Co.* 47 Iowa, 375; *Potter v. Chicago, etc., R. Co.* 46 Iowa, 399; *O'Brien v. Chicago, etc., R. Co.* 116 Fed.

Rep. 502; *Chicago, etc., R. Co. v. Pontius*, 52 Kan. 264; 34 Pac. Rep. 739; affirmed, 157 U. S. 209; 15 Sup. Ct. Rep. 585; 39 L. Ed. 675; *Lavallee v. St. Paul, etc., R. Co.* 40 Minn. 249; 41 N. W. Rep. 974; *Johnson v. St. Paul, etc., R. Co.* 43 Minn. 222; 45 N. W. Rep. 156; 8 L. R. A. 419; *Hancock v. Norfolk, etc., R. Co.* 124 N. C. 222; 32 S. E. Rep. 679; *Indianapolis, etc., R. Co. v. Houlihan*, 157 Ind. 494; 60 N. E. Rep. 943; 54 L. R. A. 787; *Dith-berner v. Chicago, etc., R. Co.*, 47 Wis. 138.

There has been much discussion whether or not the prohibition in the Fourteenth Amendment prohibiting states enacting laws giving unequal protection to citizens is the same in meaning with reference to such states as the prohibition in the Fifth Amendment is with reference to the power of Congress. The question has never been decided. See *Stratton v. Morris*, 89 Tenn. 497.

**§ 10. Validity of statute classifying instrumentalities.—** Not only may the legislature select railway companies for legislation concerning their employes, but it may specify in what particulars they shall be liable, as, for instance, concerning "any signal, telegraph office, switch yard, shop, round house, locomotive engine or train upon a railway." "These," said the Supreme Court of Indiana, "were proper to be selected as sources of unusual danger which should be guarded against; the object to be accomplished was to incite railroad companies to use the utmost diligence in the selection and supervision of their servants who are put in charge of these dangerous agencies, so that fewer lives and limbs of those who are entitled to claim the protection of our laws would be sacrificed; the legislature evidently considered that strangers and employes (the attorney and the ticket seller, for example) who were not fellow servants of those in charge of the agencies named were sufficiently protected by the railroad company's existing liability to them for the negligent operation of those dangerous agencies; the legislature evidently determined to protect all persons who were not already protected for the negligent use of particular instruments; this classification is made on the basis of the peculiar hazards in railroading, relating equally to all employers within the class; to separate railroading from other business was not an unconstitutional discrimination, because the dangers (the basis of the classifications) do not arise from the same sources; but the claim that a classification not made on the basis of dangerous agencies employed in the business, but founded on the question whether the employe who was injured without his fault by a fellow servant's negligent use of a dangerous agency was acting at the time on his own initiative in the line of his duty or under the orders of a superior, is the only constitutional classification, is unwarranted; a train is wrecked through the negligence of the engineer, two brakemen are injured without fault on their part, one acting at the time in obedience to the con-

ductor's orders, the other acting on his own initiative within the line of his duty; there should be and there is no constitutional limitation upon the legislature's exercise of the police power by which a law may not be enacted to protect both brakemen equally from the negligence of the engineer. We hold, therefore, that the act is not obnoxious to the objections urged by appellants."<sup>26</sup>

**§ 11. Power of Congress to enact statute of 1908.**—The Employers Liability Act of 1906 was stricken down because congress had attempted to legislate upon a subject or subject-matter that related wholly to the power of a state; and had so attempted to interblend that power with its power to legislate upon the subject of interstate commerce that the several clauses could not be separated and those clauses relating alone to interstate commerce remain. It was upon this ground alone that this statute of 1906 was overthrown.

<sup>26</sup> Indianapolis Union Ry. Co. v. Houlihan, 157 Ind. 494; 60 N. E. Rep. 943; 54 L. R. A. 787.

That a classification cannot be made arbitrarily, see Gulf, etc., R. Co. v. Ellis, 165 U. S. 150; 17 Sup. Ct. Rep. 255; 41 L. Ed. 666; State v. Loomis, 115 Mo. 807; Missouri Pacific R. Co. v. Mackey, 127 U. S. 205; 8 Sup. Ct. Rep. 1161; 32 L. Ed. 107; St. Louis, etc., R. Co. v. Paul, 173 U. S. 404; 19 Sup. Ct. Rep. 419; 43 L. Ed. 746; Connelly v. Union Sewer Pipe Co. 184 U. S. 540; 22 Sup. Ct. Rep. 431; 46 L. Ed. 679; Akeson v. R. Co. 106 Iowa, 54; 75 N. W. Rep. 676; Lavallee v. St. Paul, etc., R. Co. 40 Minn. 249; 41 N. W. Rep. 947; Johnson v. St. Paul, etc., R. Co. 43 Minn. 222; 45 N. W. 156; Missouri, etc., R. Co. v. Medaris, 60 Kan. 151; 55 Pac. Rep. 875; Indianapolis T. & T. Co. v. Kinney, 170

Ind. —; 85 N. E. Rep. 954; Tullis v. Lake Erie, etc., R. Co. 175 U. S. 349; 20 Sup. Ct. Rep. 136; 44 L. Ed. 192; 105 Fed. Rep. 554; Minnesota Iron Co. v. Kline, 199 U. S. 593; 26 Sup. Ct. Rep. 159; 50 L. Ed. 322; Chicago, etc., R. Co. v. Pontius, 157 U. S. 209; 15 Sup. Ct. Rep. 585; 39 L. Ed. 675; affirming 52 Kan. 264; 34 Pac. Rep. 739. An employee is as much an instrument in the forwarding of interstate commerce as a car loaded with interstate traffic; and Congress has as much power to legislate with reference to him as to the car. It certainly is a confession of the great weakness of the government when it is claimed that the United States can legislate concerning a car engaged in interstate commerce but is powerless to legislate for the protection of an employee handling that car.

But the court was very careful to point out that congress had the power to enact a statute relating to employers and employes engaged in interstate commerce, where the statute was enacted for the protection of the employe. In discussing the act of 1906, and meeting the assertion that there was a total want of power in congress in any conceivable aspect to regulate the subject with which the act dealt, and also stating that "if it be that from the nature of the subject no power whatever over the same can, under any conceivable circumstances, be possessed by congress, we ought to so declare," the Supreme Court, through Justice White, said:

"1. The proposition that there is an absolute want of power in congress to enact the statute is based on the assumption that as the statute is solely addressed to the regulation of the relations of the employer to those whom he employs and the relation of those employed by him among themselves, it deals with subjects which cannot under any circumstances come within the power conferred upon congress to regulate commerce.

As it is patent that the act does regulate the relation of master and servant in the cases to which it applies, it must follow that the act is beyond the authority of congress if the proposition just stated be well founded. But we may not test the power of congress to regulate commerce solely by abstractly considering the particular subject to which a regulation relates, irrespective of whether the regulation in question is one of interstate commerce. On the contrary, the test of power is not merely the matter regulated, but whether the regulation is directly one of interstate commerce, or is embraced within the grant conferred on congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce. We think of the unsoundness of the contention, that because the act regulates the relation of master and servant, it is unconstitutional, because under no circumstances and to no extent can the regulation of such subject be within the grant of author-

ity to regulate commerce, is demonstrable. We say this because we fail to perceive any just reason for holding that congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by congress on that subject are solely confined to interstate commerce, and, therefore, are within the grant to regulate that commerce or within the authority given to use all means appropriate to the exercise of the powers conferred. To illustrate: Take the case of an interstate railway train, that is, a train moving in interstate commerce, and the regulation of which therefore is, in the nature of things, a regulation of such commerce. It cannot be said that because a regulation adopted by congress as to such train when so engaged in interstate commerce deals with the relation of the master to the servants operating such train or the relations of the servants engaged in such operation between themselves, that it is not a regulation of interstate commerce. This must be, since to admit the authority to regulate such train, and yet to say that all regulations which deal with the relation of master and servants engaged in its operation are invalid for want of power would be but to concede the power and then to deny it, or, at all events, to recognize the power and yet to render it incomplete. Because of the reasons just stated we might well pass from the consideration of the subject. We add, however, that we think the error of the proposition is shown by previous decisions of this court. Thus, the want of power in a state to interfere with an interstate commerce train, if thereby a direct burden is imposed upon interstate commerce, is settled beyond question.<sup>27</sup> And decisions cited in the margin,<sup>28</sup> holding that state statutes which regu-

<sup>27</sup> *Mississippi R. R. Co. v. Illinois Cent. R. R.*, 203 U. S. 335, 343; 27 Sup. Ct. Rep. 90; 51 L. Ed. 209; affirming 70 C. C. A. 617; 138 Fed. Rep. 377, and cases cited; *Atlantic Coast Line R. R. v. Wharton et al. Railroad*

*Commissioners*, 207 U. S. 328; 28 Sup. Ct. Rep. 121; 52 L. Ed. 230.

<sup>28</sup> *Sherlock v. Alling*, 93 U. S. 99; 23 L. Ed. 819; affirming 44 Ind. 184; *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205; 8 Sup. Ct. Rep. 1161; 32 L. Ed. 107;

late the relation of master and servant were applicable to those actually engaged in an operation of interstate commerce, because the state power existed until congress acted, by necessary implication, refute the contention that a regulation of the subject, confined to interstate commerce, when adopted by congress would be necessarily void because the regulation of the relation of master and servant was, however, intimately connected with interstate commerce, beyond the power of congress. And a like conclusion also persuasively results from previous rulings of this court concerning the act of congress, known as the Safety Appliance Act." 29

affirming 33 Kan. 298; 6 Pac. Rep. 201; Minneapolis, etc., Ry. Co. v. Herrick, 127 U. S. 210; 8 Sup. Ct. Rep. 1176; 32 L. Ed. 109; affirming 31 Minn. 11; 16 N. W. Rep. 413; 47 Am. Rep. 771; Chicago, etc., Ry. Co. v. Pontius, 157 U. S. 209; 155 Sup. Ct. Rep. 58; 39 L. Ed. 675; affirming 52 Kan. 264; 34 Pac. Rep. 739; Tullis v. Lake Erie & W. R. R. 175 U. S. 348; 20 Sup. Ct. Rep. 136; 44 L. Ed. 192.

\* Employers' Liability Cases, 207 U. S. 463; 28 Sup. Ct. Rep. 143; 52 L. Ed. 297; decided January 6, 1908, and citing Johnson v. Southern Pacific Co. 196 U. S. 1; 25 Sup. Ct. Rep. 158; 49 L. Ed. 363, reversing 54 C. C. A. 508; 117 Fed. Rep. 462; Schlemmer v. Buffalo, Rochester, etc., Ry. 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 68, reversing 207 Pa. St. 198; 56 Atl. Rep. 417.

The question of the constitutionality of this statute has been practically foreclosed in this language used in a subsequent case: "In that case [the Employers' Liability case] the court sustained the authority of Congress, under

its power to regulate interstate commerce, to prescribe the rule of liability, as between interstate carriers and its employees in such interstate commerce, in cases of personal injuries received by employees while actually engaged in such commerce." Adair v. United States, 208 U. S. 161, 178; 28 Sup. Ct. Rep. 277; 52 L. Ed. 436, reversing 152 Fed. Rep. 737.

It has been claimed that these cases announced principles applied to specific instances which show the act under discussion to be unconstitutional: Mobile v. Kimball, 102 U. S. 695; 26 L. Ed. 238; affirming 3 Woods, 555; Gloucester Ferry v. Pennsylvania, 114 U. S. 196; 5 Sup. Ct. Rep. 826; 29 L. Ed. 158; In re Rohrer, 140 U. S. 545; 11 Sup. Ct. Rep. 865; 35 L. Ed. 572; Robbins v. Shelby Taxing District, 120 U. S. 491; 7 Sup. Ct. Rep. 592; 30 L. Ed. 694; United States v. E. C. Knight Co., 156 U. S. 1; 15 Sup. Ct. Rep. 249; 39 L. Ed. 325; Hooper v. California, 155 U. S. 648; 15 Sup. Ct. Rep. 207; 39 L. Ed. 297.

The validity of the act of 1906

§ 12. **Invalidity of Act of 1906.**—The ground of the decision<sup>80</sup> of the Supreme Court was that matters pertaining to the state and those pertaining to the Federal Government

had been before the lower courts, and in four cases had been held constitutional. The reasoning of these cases upholds the claim that Congress has the power to enact a statute on the subject; and upon that question may be considered authoritative, though, as applied to the ground upon which that act was held invalid, they cannot be so considered. They are *Spain v. St. Louis, etc., R. Co.* 151 Fed. Rep. 522, from the Eastern District of Arkansas, decided March 13, 1907; *Snead v. Central Georgia Ry. Co.* 151 Fed. Rep. 608, from the Southern District of Georgia, decided March 25, 1907; *Plummer v. Northern Pacific Ry. Co.* 152 Fed. Rep. 206, from the Western District of Washington, decided March 2, 1907, and *Kelley v. Great Northern Railway Co.* 152 Fed. Rep. 211, from the District of Minnesota, decided March 11, 1907. None of these cases make any reference to any of the others.

On the other hand, December 31, 1906, the Circuit Court for the Western District of Kentucky held the statute of 1906 void, both on the ground that Congress had no power to legislate upon the subject-matter as it related to interstate commerce, and also that it was void upon the ground the Supreme Court later held it invalid. *Brooks v. Southern Pac. Co.* 148 Fed. Rep. 986. A similar decision was rendered in the Circuit Court for the Western District of Ten-

nessee. *Howard v. Illinois Central R. Co.* 148 Fed. Rep. 997, decided January 1, 1907. These were the two cases appealed from and affirmed as the Employer's Liability Cases.

For cases upholding the validity of the Safety Appliance statute. See *Johnson v. Railroad*, 196 U. S. 1; 25 Sup. Ct. Rep. 158; 49 L. Ed. 363; affirming 117 Fed. Rep. 462; and *Schlemmer v. Railroad*, 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 88; reversing 207 Pa. St. 198; 56 Atl. Rep. 417. See also *Chicago, etc., R. Co. v. Voelker*, 129 Fed. Rep. 526; S. C. 116 Fed. Rep. 867.

See also speech of Congressman Henry of Texas, 60 Cong. Record, 1st Sess., p. 4427. See pp. 4428, 4429, 4430 and 4431 for report of minority holding the proposed act of 1908 unconstitutional, and pp. 4428, 4431, 4432, 4433 for speech of Congressman Littlefield of Maine, holding the bill unconstitutional. See also pp. 4434, 4435 and 4436 (inserted in this work as Appendix B) of same volume, holding bill valid. For dissenting views from the majority report in favor of the bill of Congressman Parker of New Jersey, see pp. 4437 and 4438 of same volume.

<sup>80</sup> *Employers' Liability Cases*, 207 U. S. 463; 143 Sup. Ct. Rep. 28; 52 L. Ed. 297, affirming *Brooks v. Southern Pac. Co.* 148 Fed. Rep. 986, and *Howard v. Illinois Central Ry. Co.* 148 Fed. Rep. 997.

were so blended that they could not be separated by the court, and, therefore, the whole act must be held void.<sup>21</sup>

**§ 13. The parts of the Act of 1906 rendering it invalid.**— In analyzing the statute of 1906 and pointing out the clauses which rendered it invalid, and why it must be considered invalid, Justice White called particular attention to the fact that the act did not confine itself to the business of interstate commerce, but sought to embrace all who engaged in interstate commerce as common carriers, regardless of the fact that the servant injured may have had nothing whatever to do with interstate commerce or the carrier when he was injured, may not have been working in connection with the business of interstate commerce. In presenting this phase of the case, he said: "From the first section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines, etc. Now, the rule which the statute establishes for the purpose of determining whether all the subjects to which it relates are to be controlled by its provisions is that any one who conducts such business be a 'common carrier engaged in trade or commerce in the Dis-

<sup>21</sup> Chief Justice Fuller and Justices White, Day, Peckham and Brewer adopted this view. Justices Moody, Harlan, McKenna and Holmes hold that the invalid portions can be separated by interpretation, and as so separated it is valid. Justices White and Day held that Congress had the power to enact a valid statute upon the subject, while Justices Brewer, Peckham and Chief Justice Fuller declared they were not

prepared to agree with what was stated in the opinion delivered by Justice White. In that determination Justices Harlan, McKenna, Moody and Holmes agreed. It will thus appear that six out of the nine judges concurred in the assumption that Congress could enact a valid statute concerning the liability of employers of an interstate carrier for injuries occasioned in interstate business.



trict of Columbia, or in any territory of the United States, or between the several states,' etc. That is, the subjects stated all come within the statute when the individual or corporation is a common carrier who engages in trade or commerce between the states, etc. From this it follows that the statute deals with all the concerns of the individuals or corporations to which it relates if they engage as common carriers in trade or commerce between the states, etc., and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce and is not confined solely to regulating the interstate commerce business which such persons may do; that is, it regulates the persons because they engage in interstate commerce and does not alone regulate the business of interstate commerce. And the conclusion thus stated, which flows from the text of the act concerning the individuals or corporations to which it is made to apply, is further demonstrated by a consideration of the text of the statute defining the servants to whom it relates. Thus, the liability of a common carrier is declared to be in favor of 'any of its employees.' As the word 'any' is unqualified, it follows that liability to the servant is co-extensive with the business done by the employers whom the statute embraces; that is, it is in favor of any of the employees of all carriers who engage in interstate commerce. This also is the rule as to the one who otherwise would be a fellow servant, by whose negligence the injury or death may have been occasioned, since it is provided that the right to recover on the part of any servant will exist, although the injury for which the carrier is to be held resulted from 'the negligence of any of its officers, agents or employees.' The act then being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their

employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of congress to regulate commerce. Without stopping to consider the numerous instances where although a common carrier is engaged in interstate commerce such carrier may in the nature of things also transact business not interstate commerce, although such local business may indirectly be related to interstate commerce, a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a state. Take again the same road having shops for repairs, and it may be for construction work as well as a large accounting and clerical force, and having, it may be, storage elevators and warehouses, not to suggest besides the possibility of its being engaged in other independent enterprises. Take a telegraph company engaged in the transmission of interstate and local messages. Take an express company engaged in local as well as in interstate business. Take a trolley line moving wholly within a state as to a large part of its business and yet as to the remainder crossing the state line.

As the act thus includes many subjects wholly beyond the power to regulate commerce and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution, and cannot be enforced unless there be merit in the propositions advanced to show that the statute may be saved.”<sup>32</sup>

**§ 14. Congress can only legislate concerning interstate business.**—In the case in the Supreme Court, an endeavor was made to uphold the Act of 1906 on the ground that “any one who engages in interstate commerce thereby sub-

<sup>32</sup> *Employers' Liability Cases*,  
207 U. S. 463; 28 Sup. Ct. Rep.  
143; 52 L. Ed. 297.

mits all his business concerns to the regulating of congress.” To this claim the court said: “To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was the purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as congress may prescribe, even although the conditions would be otherwise beyond the power of congress. It is apparent that if the contention were well founded it would extend the power of congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures.”<sup>33</sup>

**§ 15. Effect of Act of 1908 on State Legislation.**—A question of great importance is, “What is the effect of the Act of 1908 upon state legislation, where the business of interstate commerce is involved?” This question has not been as yet determined by any court. Before the passage of either the Act of 1906 or that of 1908, many states had enacted statutes which applied in terms to carriers engaged in interstate commerce, and even to carriers when engaged in the business of interstate commerce; recoveries had been allowed by employes in many instances where they received their injuries while engaged in such business. As congress had not yet legislated upon the subject, fewer difficulties were presented than there are now. The legislation of 1908 is so much broader in many of its most vital provisions that

<sup>33</sup> Employers' Liability Cases,  
207 U. S. 463; 28 Sup. Ct. Rep.  
143; 52 L. Ed. 297.

few occasions will probably present themselves; nevertheless, the question is an important one. This question under the Act of 1906 was discussed but not decided.<sup>34</sup> No question seriously arises where a state statute and the Act of 1908 cover the same incident or injury: that the latter will control and the former must give way.<sup>35</sup> There is a line of cases which hold that where a state statute amounts to the regulation of interstate commerce, yet local in its character, it can be sustained by reason of the absence of congressional legislation in respect thereto.<sup>36</sup> In one case, speaking of quarantine regulations, the Supreme Court of the United States has said: "It may be conceded that whenever congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such system to a National Board of Health, or to local boards, as may be found expedient, all state laws on the subject will be abrogated, at least so far as the two are inconsistent."<sup>37</sup> In another case it was said: "Generally, it may be said in respect to laws of this character that, though resting upon the police power of the state, they must yield whenever congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other

<sup>34</sup> Hall v. Chicago, etc., Ry. Co. 149 Fed. Rep. 564.

<sup>35</sup> Gulf, etc., Ry Co. v. Hefley, 158 U. S. 98; 15 Sup. Ct. Rep. 802; 39 L. Ed. 910.

<sup>36</sup> Such are Railroad Co. v. Fuller, 17 Wall. 560; 21 L. Ed. 710; Wilson v. Blackbird, etc., Co. 2 Pet. 245; 7 L. Ed. 412; Cooley v. Philadelphia Port Wardens, 12 How. 299; 13 L. Ed. 996; Pennsylvania v. Wheeling, etc., Bridge, 18 How. 421; 15 L. Ed. 435; Brig James Gray v. Ship John Fraser, 21 How. 184; 16 L. Ed. 106; Gilman v. Philadelphia, 3 Wall. 713; 18 L. Ed. 96; *Ex*

*parte* McNiel, 13 Wall. 236; 20 L. Ed. 624; Mobile County v. Kimball, 102 U. S. 691; 26 L. Ed. 238, affirming 3 Woods, 555; Fed. Cas. No. 7,774; Packet Co. v. Cattlesburg, 105 U. S. 559; 26 L. Ed. 1; Transportation Co. v. Parkersburg, 107 U. S. 691; 2 Sup. Ct. Rep. 732; 27 L. Ed. 584; Escanaba Co. v. Chicago, 107 U. S. 678; Morgan v. Louisiana, 118 U. S. 455; 6 Sup. Ct. Rep. 1114; 30 L. Ed. 237; affirming 36 La. Ann. 606.

<sup>37</sup> Morgan v. Louisiana, *supra*, quoted in Gulf, etc., R. Co. v. Hefley, *supra*.

reserved powers of the states, is subordinate to those terms conferred by the Constitution upon the nation.”<sup>38</sup> In an earlier case it was said: “It is said, however, that, under the decisions of this court, there is a kind of neutral ground, especially in that covered by the regulation of commerce, which may be occupied by the state, and its legislation be valid so long as it interferes with no act of congress or treaty of the United States. Such a proposition is supported in the passenger cases,<sup>39</sup> by the decisions of this court in *Cooley v. The Board of Wardens*,<sup>40</sup> and by the cases of *Crandall v. Nevada*,<sup>41</sup> and by *Gilmer v. Philadelphia*.<sup>42</sup> But this doctrine has always been controverted in this court, and has seldom, if ever, been stated without dissent. These decisions, however, all agree, that under the commerce clause of the Constitution, or within its compass, there are powers, which, from their nature, are exclusive in Congress; and, in the case of *Cooley v. The Board of Wardens*,<sup>43</sup> it was said, that ‘whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.’ A regulation which imposes onerous, perhaps impossible, conditions on those engaged in active commerce with foreign nations, must of necessity be national in its character.”<sup>44</sup>

§ 16. **Effect of Act of 1908 on State Legislation, continued.**—The cases from which these quotations are made do not necessarily settle the question; for the subject of interstate commerce under the decisions has greatly expanded in the last twenty years. Many of the cases discussing the subject have resulted in distinctions being drawn concerning what are and what are not acts of interstate commerce; and,

<sup>38</sup> *Gulf, etc., Ry. Co. v. Hefley*,  
*supra*.

<sup>39</sup> 7 How. 283.

<sup>40</sup> 12 How. 299.

<sup>41</sup> 6 Wall. 35.

<sup>42</sup> 3 Wall. 713.

<sup>43</sup> *Supra*.

<sup>44</sup> *Henderson v. Mayor*, 92 U. S. 259; 23 L. Ed. 543.

of course, in all instances where the Supreme Court of the United States reached the conclusion that a state statute did not interfere with or was not a regulation of commerce between the states, no further question was presented of the power of a state to legislate upon questions of interstate commerce. In 1886 was decided a case of far-reaching consequences, and which called forth legislation by Congress upon the subject of interstate commerce. A statute of Illinois undertook to regulate shipments over railroads where they were made both solely within the state as well as beyond its borders; and the court held so much of it as related to shipments beyond the state lines was void, because it was legislation upon a subject the regulation of which had been confided solely to Congress. This was a decision rendered before Congress had legislated upon the subject-matter of the Illinois statute.<sup>45</sup> Eight years later the doctrine of this case was applied to a bridge between two states, holding that one of the states could not regulate the tolls for passengers over it, for the reason that only Congress could regulate them.<sup>46</sup> But in considering this subject, it must not be overlooked that the interstate commerce law of the Constitution does not prohibit a state exercising its police power for the

<sup>45</sup> *Wabash R. Co. v. Illinois*, 118 U. S. 557; 7 Sup. Ct. Rep. 4; 30 L. Ed. 244; reversing 105 Ill. 236.

<sup>46</sup> *Covington, etc., Co. v. Kentucky*, 154 U. S. 204; 14 Sup. Ct. Rep. 1087; 38 L. Ed. 962; reversing 15 K. L. Rep. 320; 22 S. W. Rep. 851.

A state cannot discriminate against liquors being imported into it so long as it recognizes their sale, manufacture and use. *Scott v. Donald*, 165 U. S. 58; 17 Sup. Ct. Rep. 262; 41 L. Ed. 648; *Vance v. Vandercook*, 170 U. S. 438; 18 Sup. Ct. Rep. 674; 42 L. Ed. 1100.

Of course, a state cannot levy

a tax upon the instrumentalities of interstate commerce, even in the absence of congressional legislation. *State Freight Tax Cases*, 15 Wall. 232; 21 L. Ed. 146; reversing 62 Pa. St. 286; 1 Am. Rep. 399; *Robbins v. Shelby Taxing District*, 120 U. S. 489; 7 Sup. Ct. Rep. 592; 30 L. Ed. 694, reversing 13 La. 303; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347; 7 Sup. Ct. Rep. 1126; 30 L. Ed. 1187; reversing 95 Ind. 12; 48 Am. Rep. 692; *Telegraph Co. v. Texas*, 105 U. S. 460; *Pensacola Tel. Co. v. Western Union Tel. Co.* 96 U. S. 1; 24 L. Ed. 708; affirming 2 Woods, 643; Fed. Cas. No. 10,960.

safety and health of its own inhabitants. Thus, a statute concerning color-blindness of railroad engineers is valid, although they may be engaged in running locomotives hauling trains from one state to another, on the ground that it was the plain duty for a state to make provisions for the safety of its inhabitants.<sup>47</sup> So statutes respecting crossings of railroads and highways of railway companies engaged in interstate commerce are valid; so are statutes regulating the speed of trains within municipalities.<sup>48</sup> So are statutes requiring guard posts on railroad trestles and bridges.<sup>49</sup> But notwithstanding these decisions, it is an accepted rule that in all instances where freedom of commerce between the states is directly involved, the failure of Congress to enact a statute fitting a particular instance is to be taken as an indication of the will of that body that such commerce should remain free and untrammelled; and in such instances attempted state legislation on such particular instances is void. But notwithstanding this general rule, where Congress enacted a law making it unlawful to transport known diseased cattle from one state to another, a state statute imposing a civil liability upon a railway company which brought diseased cattle into the state, and another statute that made it a finable offense to bring into the state cattle which, within ninety days before their importation, had herded with stock having a contagious disease, were held valid; for the state had not assumed charge of their transportation but was aiming to protect its own people and their property against the danger of contact with diseased stock. But it was said in substance that if the entire subject of transportation of diseased stock

<sup>47</sup> *Smith v. Alabama*, 124 U. S. 465; 8 Sup. Ct. Rep. 504; 31 L. Ed. 508, affirming 76 Ala. 69; *Nashville, etc., R. Co. v. Alabama*, 128 U. S. 96; 9 Sup. Ct. Rep. 28; 32 L. Ed. 352; affirming 83 Ala. 71; 3 So. Rep. 702.

<sup>48</sup> *Erb v. Morasch*, 177 U. S.

584; 20 Sup. Ct. Rep. 819; 44 L. Ed. 897; affirming 60 Kan. 251; 56 Pac. Rep. 133.

<sup>49</sup> *New York, etc., R. Co. v. New York*, 165 U. S. 628; 17 Sup. Ct. Rep. 418; 41 L. Ed. 853; affirming 142 N. Y. 646; 37 N. E. Rep. 568.

from one state to another had been taken over by Congress and a system devised by which such stock could be excluded or their transportation so regulated as not to endanger the inhabitants or property of the receiving state, all local regulations would cease and remain suspended until the Federal statute was repealed and the Federal control abandoned.<sup>50</sup>

§ 17. **Result of decisions.**—If it be construed that the Federal Employers' Liability Act covers every instance of any person suffering an injury while he is employed "in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states and territories, or between the District of Columbia or any of the states or territories and any foreign nation," then all state regulations—at least those changing or modifying the common law liability—are void, because Congress has manifested a desire and has covered the whole subject so far as giving a statutory action is concerned. The entire question resolves itself into a matter of construction. A careful reading of the statute would seem to indicate that Congress had covered the entire subject of liability of an interstate railroad company for negligence to its employe engaged in interstate commerce; and that is the consensus of opinion of those who have carefully examined the statute.<sup>51</sup>

<sup>50</sup> *Missouri, etc., Ry. Co. v. Haber*, 169 U. S. 613; 18 Sup. Ct. Rep. 488; 42 L. Ed. 878; affirming 56 Kan. 694; 44 Pac. Rep. 632; *Reid v. Colorado*, 187 U. S. 137; 23 Sup. Ct. Rep. 92; 47 L. Ed. 108; *Rasmussen v. Idaho*, 181 U. S. 198; 21 Sup. Ct. Rep. 594; 45 L. Ed. 820; affirming 7 Idaho, 1; 52 L. R. A. 78; 97 Am. St. Rep. 234; 59 Pac. Rep. 933.

Any attempt to classify the questions by the adoption of a rule that a majority of the freight carried on the train must be interstate freight or a majority of the

passengers on the train must be interstate passengers before it can be said that the train is an interstate train or those employees in charge of it are employed in interstate commerce, must impress any one as an impracticable rule and one that nullifies the act in its practical workings. If such a rule were adopted the act would scarcely be worth the paper on which it is written; and besides, no reason can be assigned why such a rule should be adopted.

"It is clear, from the debates, that many of the Senators



§ 17a. Must interstate employee bring his action on the statute.—If the act of Congress is exclusive, must an employee engaged in interstate commerce, when injured, bring his action upon the statute? This is a very important

entertained the notion that the act would nullify all state legislation upon the same subject so far as it related to employees engaged in interstate commerce. In discussing the subject, Senator Bacon said: "My proposition is this—and as a proposition of law I do not think I can possibly be mistaken in it—that whenever the Congress of the United States has jurisdiction to enact a law for the regulation of interstate commerce, it necessarily nullifies the law of a state passed upon the same subject, and that when you pass this law no law of any state prescribing the rules of liability for an employee engaged in interstate commerce is any longer of any force or effect. That is necessarily so, and whether it can be enforced in a state court or in a federal court, the law thereafter must be this law and no other law. The day it is passed every state law which prescribes a rule of liability for an employee engaged in interstate commerce is annulled, and it is the same as if it had been the repeal of the law of the state."

Senator Beveridge: "Our power is exclusive when we act."

Senator Bacon: "Absolutely so. There is no doubt about that in the world. It is only a question of jurisdiction to act."

Senator Beveridge: "Certainly."

Senator Bacon: "If we have the jurisdiction to act, and do act,

the federal law is supreme, and it nullifies every state law on the subject."

Senator Clay: "My idea was that when the bill should become a law all laws in the state fixing the rule of liability of common carriers engaged in interstate commerce would be superseded by virtue of this law, and whenever an employee proceeds against a railway company for injuries suffered, he must look to this statute to fix the rule of liability, and not to the statute of the state."

Senator Borah: "If a party is engaged at the time of his injury in interstate commerce, his rights and obligations must undoubtedly be settled by the law which we shall pass. If he should be engaged in state commerce or interstate commerce, the state law would obtain. In other words, this proposed law would only annul the state law in so far as it affects interstate commerce."

Senator Clay: "I think the Senator is eminently correct. The statute of Georgia, fixing a liability against railroad companies in favor of employees relating to commerce within the state would not be changed by the passage of this statute. It would simply affect the employees engaged at the time of the accident in interstate commerce. I do not think there is any question about that." 60 Cong. Record, 1st Sess., pp. 4528, 4529.

question which no one can satisfactorily answer. But it would seem that if the act of Congress repeals or suspends State legislation upon the scope of its provisions then such an employee must bring his action upon the statute, and if he does not he will be defeated.<sup>51\*</sup>

**§ 18. Act of 1906, validity in District of Columbia and Territories.**—The act of 1906 was held invalid also as to a cause of action arising in the District of Columbia.<sup>52</sup> And the same holding was made with respect to the territories.<sup>53</sup>

**§ 19. Construction of statute.**—As this statute was enacted for the benefit of the employe, and is an implied declaration on the part of the Congress that the old and harsh rules of the common law were inadequate for the protection of his life and limbs when applied to the new and changed conditions of industrial life under which he is compelled to render services in order to gain a livelihood, and thereby not become a burden on the public for support in case of his injury, it is to be liberally construed so as to carry out the intention of the legislature. The argument of hardship upon the railroad company is not to be considered. That argument is plausible “only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employe and the public.” When an injury happens to an employe, there must be a hardship to him. “If its burden is

<sup>51\*</sup> If the pleading does not show that the plaintiff was engaged in interstate commerce, but the evidence develops the fact that he was, then there would be a fatal variance that would defeat him unless the complaint or declaration was amended. The defendant could file an answer or plea setting up the fact that he was so engaged which would present an issue for the jury; and if proven the verdict must be for the defendant.

So if there was a declaration upon the statute, but the evidence showed that the plaintiff was not engaged in interstate commerce when injured, the verdict must be for the defendant; and no answer or plea to that effect is necessary.

<sup>52</sup> *Hyde v. Southern Ry. Co.* 31 App. D. C. 466. But see same case, 36 Wash. L. Rep. 374.

<sup>53</sup> *Atchison, etc., Ry. Co. v. Mills* (Tex. Civ. App.), 108 S. W. Rep. 480.

transferred, so far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries,<sup>54</sup> and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who would measurably control their causes, instead of upon those who are in the main helpless in that regard."<sup>55</sup> In construing the Safety Appliance Act, Chief Justice Fuller said: "The primary object of the act was to promote the public welfare by securing the safety of employes and travelers, and it was in that aspect that it was remedial, while for violations a penalty, one hundred dollars, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collector of customs, that rule not requiring absolute strictness of construction."<sup>56</sup> Of course, in the Federal Employers' Liability Act no penal offense is involved—only a civil liability; but the above quotation, aside from reference to the penal offense, is quite applicable.

<sup>54</sup> Injury by unlawful couplings.

<sup>55</sup> *St. Louis, etc., Ry. Co. v. Taylor*, 210 U. S. 210; 28 Sup. Ct. Rep. 616; 52 L. Ed. 1061.

<sup>56</sup> *Johnson v. Southern Pac. Ry. Co.* 196 U. S. 1; 25 Sup. Ct. Rep. 158; 49 L. Ed. 363, reversing 117 Fed. Rep. 462; 54 C. C. A. 508.

## CHAPTER III.

### TO WHOM STATUTE APPLIES.

#### SECTION.

- 20. Carriers within territories.
- 21. Carriers engaged in interstate commerce.
- 21a. Interurban and street railway common carriers.
- 22. "While engaged in commerce between the states."

#### SECTION.

- 23. To whom common carrier by railroad liable.
- 24. What employee may bring his action upon the statute.
- 24a. Interstate employee injured by negligence of intrastate employee.

§ 20. **Carrier within Territories.**—Congress has plenary power in all matters pertaining to the territories, the District of Columbia, the Panama Canal Zone, and other possessions of the United States. A common carrier by railroad in such divisions of the United States is liable "to any person suffering injury while he is employed by such carrier in any of said jurisdictions." The statute, of course, covers the territories of Arizona, New Mexico, Alaska, the District of Columbia, Porto Rico, Hawaiian Islands and the Philippine Islands.

§ 21. **Carriers engaged in interstate commerce.**—The common carrier must be one "by railroad." No other common carrier is covered by the statute. It must be a "common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations." Therefore, any railroad company carrying commercial products from one state to another, or from a state to a territory or *vice versa*, or from a state to the

District of Columbia or *vice versa*, or from a state or territory to a foreign nation, as to New Mexico or to Canada, or to British Columbia, comes within its provisions. So if a common carrier by railroad carry commercial products from the interior of a state bordering on the seashore and then load it upon its own ocean going vessels and carry it to a foreign port, it would be engaged in commerce between such state and a foreign nation; and likewise it would be so engaged even though it did not have its own vessels if it undertook to secure their transportation across the ocean to a foreign port. But if it only undertook to transport and deliver them to a consignee at the seaport, and such consignee was to forward them to a foreign nation, it would not be engaging in commerce between a state and a foreign nation. Yet if it accepted goods billed and addressed to a foreign nation and undertook to deliver them to a company or vessel engaged in transporting articles to the port of the destination of such goods it would be engaged in commerce between a state and a foreign nation.<sup>1</sup> Difficult questions necessarily arise when a question purely of interstate commerce is involved. The Safety Appliance Act, however, affords a reasonable analogy and in a measure solves some of the questions that arise. That statute provides that "any common carrier engaged in interstate commerce by railroad" shall equip its cars with automatic couplers. The Employers' Liability Act applies to a "common carrier by railroad while engaging in commerce between any of the several states." There is practically no difference in meaning between these two phrases of these two statutes so far as designating the common carriers to which they are applicable. Under the Safety Appliance Act it has been held that a railroad wholly within a state—not even so much as touching the boundary line of the state—may be engaged in interstate traffic and be liable to equip its cars in accordance with its provisions.<sup>2</sup> And so it has

<sup>1</sup>The distinction is a fine one, under the Safety Appliance Act. but it is justified by the decisions See Secs. 131, 133.

<sup>2</sup>See Secs. 122, 133.

been held that the same railroad (situated in Colorado),—a narrow gauge road—was engaged in interstate traffic when it received express packages of an express company, shipped by such express company from Kansas City, Missouri, delivered to it within the state of Colorado, and re-shipped by transferring from the car of an interstate commerce railroad to its own narrow gauge cars, the packages being billed to a station on its road.<sup>3</sup> On the contrary, in an instance similar to the first instance given, where a narrow gauge road, wholly within the state of Ohio, operated in connection with the Baltimore and Ohio Railroad, where the goods were of necessity transferred from a narrow gauge car to a wide gauge car, it was held that such narrow gauge road was not engaged in interstate commerce.<sup>4</sup> The latter decision is, however, sharply criticised in the former decision;<sup>5</sup> and to the author the reasoning in the Colorado case rests upon a sounder basis. So under the Interstate Commerce Act it has been held that a belt railroad, used to transfer freight cars around a city, and so prevent their transportation through said city, having connections with interstate commerce railroads, was subject to such act.<sup>6</sup> So the movement of cars in the car yards of a railroad, such cars not being properly equipped with automatic couplers, but which had been brought by such railroad from another state, was a violation of that act.<sup>7</sup> Likewise it has been held that a railroad company carrying from one state to another on its own construction cars, its own iron rails, in cars not properly equipped with automatic brakes, was liable to the penalty of the act imposed for using insufficiently equipped cars in interstate commerce.<sup>8</sup> The phrase “while engaging in commerce between any of the several states” is, especially in the light of these decisions, a very broad and far-reaching one. Of course, while transporting freight having its origin in a state to another point within the same state, not in connection with

<sup>3</sup> See Secs 122, 133.

<sup>4</sup> See Sec. 133.

<sup>5</sup> See Sec. 134.

<sup>6</sup> See Sec. 125.

<sup>7</sup> See Secs. 124, 126, 127.

<sup>8</sup> See Sec. 119.

other freight brought from another state, would not be engaging in interstate commerce or commerce between the states; and an employe of the company injured while engaged in such commerce could not come within the provisions of the statute if he was injured; but if there was a single car load of products in the train en route from another state to a point within the state of destination, that would convert the entire train into an interstate commerce relation, and the railroad company would then be engaged in commerce between the states.\*

\* See illustrations of Justice White quoted in Section 13.

This phase of the subject did not escape the attention of the able lawyers in the Senate. This debate took place in part in the Senate:

Senator Bacon: "Now, I want to ask the Senator a question by way of illustration. Of course, never mind how large a train may be and how full of goods it may be, all the balance of it may be intrastate freight, but if upon that train there is one single box that is to cross the line, it makes the train engaged in interstate commerce. I want to illustrate it to the Senator [Dolliver of Iowa] by a concrete case. We will suppose that a train starts from Richmond [Va.] to Alexandria [Va.]. These are terminal points for the train. It has freight consigned exclusively to Alexandria or to points between Richmond and Alexandria. That makes it altogether out of the jurisdiction of this bill; but if at Orange Court House [Va.], on the way, a man puts on it a box of cigars which is consigned to a party in Baltimore, that would immediately change the character of the train, would it not, and

make it after that a train engaged in interstate commerce?"

. . . .

Mr. Dolliver: "I will say to the Senator, if I understand correctly the decisions of the Supreme Court, that they are to the effect that a railroad that is entirely within a state, but carrying commerce destined to points outside the state, is engaged in interstate commerce and is subject to the interstate commerce act."

Mr. Bacon: "That is a clear statement of the law. Then I am correct in the suggestion that on a train leaving Richmond and coming to Alexandria, those being terminal points, having no freight except for Alexandria and intermediate points, if, when it reached Orange Court House, a box of cigars was put on it, consigned to Baltimore, it would be converted at once from a train not subject to the provisions of this act into one that is subject to it. Am I not correct in that, I ask the Senator from Iowa? I am correct in the conclusion that at Orange Court House it will be converted into a train, employees of which would become engaged in interstate commerce, and everything

**§ 21a. Interurban and street railway common carriers.—**

An interesting phase of the question now under discussion is that pertaining to common carriers by the so-called interurban electric railways and by street railways. The former partake more of the character of a common carrier by steam railroad than the latter, and in principle do not differ from them. It is beyond discussion that the statute includes all common carriers by electric interurban railroads when engaged in interstate commerce. There are many instances, also, where common carriers by street railroads pass from one state to another and carry passengers across state lines. Such is the case between Kansas City, Missouri, and Kansas City, Kansas; so between New Albany and Jeffersonville, Indiana, and Louisville, Kentucky; so between Cincinnati, Ohio, and Covington, Kentucky; so between the District of Columbia and Alexandria, Virginia; and so between Niagara

would be subject to this law at this point, and from there to Alexandria."

Mr. Dolliver: "I have no doubt that is true."

Mr. Bacon: "Very well. The point I want to ask the Senator is this: If on the line of road between Richmond and Orange Court House an accident occurs, the rule of liability would be determined by the law of Virginia, because there would be no interstate commerce; but after the box of cigars had been put on at Orange Court House if an accident and an injury occurred between there and Alexandria, although it was the same train and the same crew and the same people, the rule of liability would be determined by this law. If the injury was incurred before the train reached Orange Court House, the case would go into the state court, and be determined by Virginia law. But after the box

of cigars had been put on the train at Orange Court House, if an injury occurred to the crew of the same train, the case would go into the federal court and be determined by the act of Congress as to the rule of liability. Am I correct in that?"

Mr. Dolliver: "If the court will agree with the judgment of the Senator."

Mr. Bacon: "I just simply wished to know the opinion of the Senator. These are intricacies of the law which I thought it was well the Senator should inform us about."

Mr. Dolliver: "All those questions have been discussed in the court and the laws between interstate and state commerce fairly well defined."

Mr. Bacon: "That would be the effect in this particular case." 60 Cong. Record, 1st Sess., p. 4547.



City, New York, and Canada. Other illustrations might be named. These several common carriers by street railroads are beyond question common carriers by railroad; and when transporting passengers (or even freight as they sometimes do) from one state to another are beyond question common carriers engaged in interstate commerce. The Federal Employers' Liability Act clearly applies to them; and the employes of such street railways while engaged in the transporting of such passengers (and freight), if injured, can invoke the provisions of this statute in securing redress for their injuries.<sup>10</sup> It should not be forgotten that street railway companies are always in other matters treated as common carriers.

§ 22. "While engaging in interstate commerce between the states."—More than fifty years ago the Supreme Court decided a case involving interstate commerce which is instructive in this connection, and which was relied upon in the Colorado decision.<sup>11</sup> We make the following quotation from the earlier case in this connection: "In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River goods destined and marked for other states than Michigan, and in receiving and transporting up the river goods brought within the state from without its limits but inasmuch as her agency in the transportation was entirely within the limits of the state, and she did not run in connection with, or in continuation of, any line of vessels porting goods destined for other states, or goods brought was engaged entirely in domestic commerce. But this con-

<sup>10</sup> No analogy can be drawn from the Safety Appliance Act, because of the radical differences between the objects of these two statutes when applied to this subject-matter; the one applies to the employes of a railroad while engaged in commerce between states, while the other applies to cars not prop-

erly equipped when used in interstate commerce. In the first statute the safety of the employee is put forward as of the first importance, while in the latter his safety is incidental and the equipment of the car the primary object.

<sup>11</sup> See Secs. 122, 133.

clusion does not follow. So far as she was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan and destined to places within that state, she was engaged in commerce between the states, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce, for whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress. It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a state; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a state on which grain or fruit is transported to a distant market. We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the states, when that agency extends through two or more states, and when it is confined in its action entirely within the limits of a single state. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a state, and leaving it at the boundary line at the other end, the Federal jurisdiction would be entirely

ousted, and the constitutional provision would become a dead letter."<sup>12</sup> Where a railroad wholly within the State of Georgia transported freight originating in Cincinnati, Ohio, over line to its destination, upon through bills of lading, a through charge and assignment of the entire charge among the roads contributing to the movement having been entered into, the Georgia railroad, was held to be engaged in interstate commerce.<sup>13\*</sup>

**§ 23. To whom common carriers by railroad liable.**—It is clear that a common carrier by railroad is not liable under the statute to any one except its employees. The statute has

<sup>12</sup> The *Daniel Ball*, 10 Wall. 567; 19 L. Ed. 999, reversing *Brown*, Admr., Cas. 193; Fed. Cas. No. 3,564.

<sup>13\*</sup> *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 184. For an illustration where, the facts being very similar, the state road was held not to be engaged in interstate commerce, see *Gulf, etc., R. Co. v. Texas*, 204 U. S. 403; 24 Sup. Ct. Rep. 360; 51 L. Ed. 540; affirming 97 Tex. 274.

An employee engaged in taking goods, shipped from another state, from the car, in which they were transported, across the station platform to the freight depot, is engaged in interstate commerce transportation. *Rhodes v. Iowa*, 170 U. S. 412. Coal brought from beyond the state does not cease to be interstate transportation until actually delivered to the consignee. *McNeill v. Southern Ry. Co.* 202 U. S. 543; 26 Sup. Ct. Rep. 722; 50 L. Ed. 1142.

But a cab owned by a railroad and used to carry passengers from a ferry to its hotel is not used in interstate commerce. *Pennsyl-*

*vania Ry. Co. v. Knight*, 192 U. S. 21, the court saying: "If a cab which carries passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses, also engaged in interstate commerce, and where will the limit be placed? We are of the opinion that the cab service is an independent local service, preliminary or subsequent to any interstate transportation." Perhaps the gathering of freight from the place of business of shippers and distributing freight to such places of business by vehicles employed by a railroad does not make the carriage between such place of business and the freight station of the carrier a part of an interstate journey. *Interstate Commerce Commission v. Detroit, etc., R. Co.* 167 U. S. 633; affirming 74 Fed. Rep. 833; reversing 57 Fed. Rep. 1005.

no reference to a passenger or any other person than an employe. Congress has seen fit to so limit the act; and its provisions cannot be extended. But this statute does not prevent an employe not coming within its provisions bringing and maintaining an action to recover damages on a common law liability of the carrier.

**§ 24. What employe may bring his action upon the statute.**—It is an interesting question, concerning what employe may bring his action upon the statute, or claim a right to recover damages thereupon for his injuries. It is tautology to say that he must have been an employe of the defendant at the time of the injury and be injured in the line of his duty. That is elementary and need not be discussed. In fact, it is here assumed. The statute in part answers the question when it provides that “every common carrier by railroad while engaging in commerce between any of the several states,” “shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce.” This last quoted clause designates the employe who can recover for his injuries; for he must be injured “while he is employed by such carrier in” commerce between the states or between the states and territories. Of course, if he is injured in a territory or the District of Columbia, or in the Panama Canal Zone, “or other possessions of the United States,” while in the employ of a common carrier by railroad, it is immaterial whether he was engaged “in such commerce” or not; because the provisions of the statute with reference to the territories and such district, zone and “other possessions,” are broader than those relating strictly to interstate commerce carriers, and necessarily so; for in the latter instance a constitutional question is involved that is not involved in the former instance. The word “while” is significant; for by its terms the employe must be engaged in interstate commerce in order to enable him to recover under the statute. If he be an employe of the railroad company and at the time of his injury

be not engaged in interstate commerce, he cannot recover under the provisions of the statute. Of course, all trainmen while actually at work in train work would be engaged in interstate commerce; and perhaps telegraph operators engaged in telegraphing train orders. But engine wipers, car repairers in shops, section hands, bridge builders, carpenters engaged in constructing railroad buildings, would not be, while so at work, engaged in interstate or any other commerce. So it would be a strained construction of the statute to say that yardmen in making up a train to be hauled in interstate commerce would be engaged in such commerce; although the trainmen of such train would be, and especially so in taking on or setting off cars at intermediate stations.<sup>13</sup>

<sup>13</sup> In the debate upon this proposition there was some difference of opinion as to the scope of the statute and the employees of an interstate commerce railroad who came within its provisions. Senator Beveridge, of Indiana, thought an employee of a railroad company 100 miles away from its line of road felling trees for its use would come within its provisions; but Senator Dolliver, of Iowa, called his attention to the clause of the proposed statute, and asked: "But are they employed in such commerce, in interstate commerce?" and added that he considered the statute clear as it stands now. 60 Cong. Record, 1st Sess., p. 4542.

In discussing the Act of 1906, which contained a similar provision, Justice White said: "Thus the liability of a common carrier is declared to be in favor of 'any of its employees.' As the word 'any' is unqualified, it follows that liability to the servant is co-extensive with the business done by the employers whom the statute embraces; that is, it is in favor

of any of the employees of all carriers who engage in interstate commerce. This also is the rule as to the one who otherwise would be a fellow servant by whose negligence the injury or death may have been occasioned, since it is provided that the right to recover on the part of any servant will exist, although the injury for which the carrier is to be held resulted from the negligence of any of its officers, agents or employees." *Employers' Liability Cases, supra.*

The following extract is made from the report of counsel for railroad companies held July 13, 14 and 15, 1908, at Atlantic City, upon the question under discussion:

"A most important and difficult question is presented when we come to inquire when an employee is 'employed in such commerce.' There are engaged by railroad companies various classes of employees. There are those engaged in the operation of trains. There are those engaged in switching

As the employe must be engaged in the interstate commerce of his employer, from the very nature of the ques-

service in yards. There are those engaged in round houses, who receive engines coming off the road and make light repairs upon them and send them out. There are those engaged in maintenance of the depots, tracks and bridges. There are the freight handlers, loading and unloading freight. There are clerks in freight offices and in the general offices of the railroad. Does this Act apply to all of these employees?

"On a railroad engaging in interstate commerce it would be difficult to say that any one of these employees is not at some time performing some service having a direct relation to interstate commerce. The Supreme Court of the United States has laid down the proposition in more than one case that a thing may be within the letter of the statute and not within its meaning, and within its meaning though not within its letter; that the intention of the law maker is the law; that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of a statute is not within the statute unless it be within the intention of the makers. These cases are gathered in *Hawaii v. Manchiki*, 190 U. S. 197; 23 Sup. Ct. Rep. 787; 47 L. Ed. 1016. We are, then, to ascertain what is the purpose of this Act.

"We suppose it can be fairly said that its purpose is to render the transportation of persons and property safe and to protect employees engaged in such transpor-

tation; in other words, that this Act is similar in its purposes to the Acts requiring safety appliances and fixing the hours of service of telegraph operators and persons employed in transportation. Probably this can be broadened so as to include within the intention of the Act all persons whose hours of service and whose protection Congress could legitimately consider as necessary to securing the safety of passengers and freight moving in interstate commerce. And we think that in this view a sensible construction of the Act would eliminate those persons whose service so remotely relates to such safety as not to be fairly within the regulating power of Congress.

"In another part of this report the question is discussed as to what are the classes of employees who can be fairly selected as having an employment involving a hazard not considered in ordinary employment. It is there pointed out that various statutes have been passed from time to time abolishing or limiting the rule of fellow servant, some of these statutes in terms applying only to those engaged in the operation of a railroad, and others being construed as limited in this respect, although the statutes are not in terms so limited. Some illustrations may be drawn from these cases.

"Thus the Supreme Court of Iowa held that the statute of that state applied only to those dangers which were peculiar to railroad operation.

"In *Luce v. R. Co.* 67 Iowa, 75,

tion, his employer at the moment of the injury must be engaged in interstate commerce, not generally but in that

24 N. W. 600, the plaintiff was employed in a coal house of a railroad company and while hoisting coal for the purpose of coal-ing an engine was struck by a crane by which the coal was hoisted, due to the negligence of a fellow servant. It was held that the statute did not apply.

"In *Foley v. R. R. Co.* 64 Iowa, 644, 21 N. W. 124, a recovery was denied to a car repairer for injuries he received while repairing a car on a side track, by reason of the alleged negligence of a co-employee in failing to block the wheels of the car.

"In *Stroble v. R. R. Co.* 71 Iowa, 555, 31 N. W. 63, a recovery was denied to an employee of a railroad company who was injured by the giving way of certain steps leading up to a platform for loading coal.

"In *Malone v. R. Co.* 65 Iowa, 417, it was held that an employee of a railroad company employed in wiping off engines, opening and closing the doors of the engine house, removing snow from the turntable and tracks and turning the turntable when engines were being run between the main track and the engine house, was not engaged in the operation of a railroad within the statute.

"In *Reddington v. R. R. Co.* — Iowa, 66, 78 N. W. 800, it was held that the railroad company was not liable to a brakeman for injuries received while he was assisting in coaling an engine, through the negligence of a co-employee in operating the hoisting crane so as to knock him from the platform, such movement not

being necessary in order to permit the train to start.

"The Supreme Court of Minnesota has construed its Employers' Liability Act as applying only to those employees of railroads engaged in the operation of railroads.

"In *Johnson v. R. Co.* 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419, a crew of men, of whom the plaintiff was one, were engaged in repairing a bridge on defendant's railroad. In performing the work it was necessary to leave the draw partly open. Through the negligence of one of the crew the draw was left unfastened. It was blown part shut by the wind and injured plaintiff while he was at work between the stationary part of the bridge and the draw. It was held that the statute did not apply.

"In *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 26 Sup. Ct. Rep. 159, 50 L. Ed. 322, affirming 93 Minn. 63, 100 N. W. Rep. 681, the judgment of the Supreme Court of Minnesota reported in 93 Minn. 63, was affirmed. It appeared in that case that the court had allowed a recovery for the loss of an arm by the plaintiff, while repairing an engine of the defendant, through the negligence of a fellow servant.

"In *Jemming v. R. R. Co.* 96 Minn. 302, 104 N. W. 1079, the plaintiff was injured while employed by the railroad company as a pitman. He was one of a crew of nine men operating a steam shovel in a gravel pit, and was injured through the negligence of a fellow servant. It was

specific instance, and in that identical commerce he must be injured if he recovers under the statute.

held that the statute did not apply for the reason that plaintiff and his fellow servants by whose negligence he was injured, were not engaged in operating a railroad at the time of the accident.

"The Kansas statute is given in *Missouri Ry. v. Mackey*, 127 U. S. 206; 8 Sup. Ct. Rep. 1161; 32 L. Ed. 107; affirming 33 Kan. 298; 6 Pac. Rep. 291. It was there held, affirming the judgment of the Supreme Court of Kansas, that a fireman on an engine employed in transferring cars from one point to another in a yard when it was run into by another engine owing to the negligence of the engineer or the latter, could recover.

"But in *Missouri, K. & T. R. Co. v. Medaris*, 60 Kan. 151, 55 Pac. 875, it was held that Medaris, who was employed in setting a curbing around an office building and depot of the railroad company at Parsons, Kansas, could not recover.

"In *Chicago, etc., R. R. Co. v. Pontius*, 154 U. S. 209; 15 Sup. Ct. Rep. 585, 39 L. Ed. 675, affirming 62 Kan. 264, 34 Pac. Rep. 739, a judgment was sustained in favor of Pontius, who was a bridge builder, the Supreme Court saying: 'He was engaged at the time the accident occurred not in building a bridge but in loading timbers on a car for transportation over the line of defendant's road.'

"In *Chicago, R. I. & P. R. R. v. Stahley*, 62 F. R. 363, Mr. Justice Brewer, in an opinion written by him for the Circuit Court of Appeals for the English Circuit, held that the statute applied to a

workman in a round house who was injured while getting a locomotive ready for immediate use, and that he could recover for his injury notwithstanding it was occasioned by the negligence of a fellow servant. Mr. Justice Brewer said:

"He was not engaged in repairing an old engine or constructing a new one, but in putting that engine, which had recently arrived, in condition for immediate use. He was \* \* \* not engaged in any outside work remotely related to the business of the company; he was not cutting ties on some distant tract to be used by the company in preparing its roadbed, nor in mining coal for consumption by the engines, nor even in the machine shops of the company, constructing or repairing its rolling stock; but the work which he was doing was work directly related to the movement of trains—as much so as that of repairing the track.'

"In *Indianapolis U. Ry. Co. v. Houlihan*, 157 Ind. 494, 60 N. E. 943, the court held that the statute applied to a telegraph operator stationed at a track junction and whose duties required him to cross the railroad tracks, and who, while so doing, was struck by a train running twenty miles an hour but which gave no warning of its approach.

"In *Pittsburgh, etc., R. Co. v. Lighthouse*, 168 Ind. 438, 78 N. E. 1033, the plaintiff was a passenger train engineer and was standing between two railroad tracks where he had gone to take charge of his engine, when he was



**§ 24a. Interstate employee injured by negligence of Intrastate employee.**—The statute wipes out the rule of fellow servant. Then, if an employee is injured while engaged

knocked down and injured by another train of the railroad company, in the city of Logansport, Indiana. It was held that the statute applied and that he could recover.

"In *Southern Ind. R. R. Co. v. Harrell*, 161 Ind. 262, 68 N. E. 262, the railway company was engaged in the construction of a railroad bridge over White River. A heavy stone was being lifted by a derrick. One of the employees was injured by the negligent handling of this apparatus. It was held that he could not recover under the statute.

"In *Indianapolis & G. R. Co. v. Foreman*, 162 Ind. 85, 69 N. E. 669, the plaintiff, an employee of the railroad company engaged in the construction of a track, was injured while being transported to his home in the work car of the company, by reason of the negligence of the employees of another train. It was held that he could not recover.

"In *Pittsburg R. R. Co. v. Ross*, 169 Ind. 3, 80 N. E. 845, a switchman injured by the movements of cars in a switch yard was held entitled to recover.

"In *Indianapolis T. & T. Co. v. Kinney*, by etc., 170 Ind. —, 85 N. E. 954, the Supreme Court of Indiana held that a member of a section gang who was injured by the negligence of a fellow laborer while unloading steel rails from a car could not recover.

"It is, however, to be stated that the courts in certain other states have been much more liberal in the construction of employers' liability acts than some

of the northwestern states whose opinions we have cited.

"Thus, in *Callahan v. St. L. Mer. B. Co.* 170 Mo. 473, 60 L. R. A. 249, 71 S. W. 208, affirmed in 194 U. S. 628, it was held that where certain workmen were on a railroad trestle which crossed a street in St. Louis and were throwing timbers down into the street, an employee of the company whose duty it was to warn pedestrians was entitled to recover for an injury received through the negligence of the workmen on the trestle, it being held that he was engaged in the operation of the road.

"In *Texas & P. R. Co. v. Carlin*, 111 F. R. 777, 189 U. S. 354, 23 Sup. Ct. Rep. 585, 47 L. Ed. 849, it was held that an employee could recover who was repairing a bridge while trains were using it and was injured by being struck with a spike maul which had negligently been left on the bridge track by the bridge foreman.

"In *Georgia, etc., R. Co. v. Miller*, 90 Ga. 571, a brakeman was injured while under a disabled engine out on the road. It was held that he could recover notwithstanding his injury was caused by the negligence of a fellow servant.

"In *Hancock v. Norfolk, etc., R. Co.* 124 N. C. 222, 32 S. E. 679, it was held that a section hand who was injured by reason of the handcar on which he was riding running into an open switch, negligently so left by a train brakeman, could recover.

"See also *Chesapeake & O. Ry. Co. v. Hoffman*, 63 S. E. 432, con-

in interstate commerce by the negligent act of an intrastate commerce servant, can he recover? Unquestionably

struing Section 163, Va. Const., 1902.

"That a car may be in use in interstate commerce although at the time empty, or about to start on a journey, or designed for company use and not for traffic, would seem to be held in such cases as *Voelker v. Railway Co.* 116 F. R. 867, affirmed 129 F. R. 522. See *U. S. v. I. C. R. R. Co.* 156 F. R. 183; *Johnson v. S. P. Co.* 196 U. S. 1; *Schlemmers v. V. R. Co.* 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 681; reversing 207 Pa. St. 198; 53 Atl. Rep. 417; *U. S. v. C. M. & St. P. R. Co.*, 149 F. R. 486, 490.

"But, according to *Lurton, J.*, in *St. L. & S. F. Co. v. Delk*, 158 F. R. 939, a car set on a dead track for repair is not within the Safety Appliance Act (used in interstate commerce), 'any more than a car in a shop awaiting repairs.'

"If a train is engaged in interstate commerce, any employee employed on such train is employed in such commerce, and hence, if injured, is within the Act. This would embrace all trainmen.

"Again, if switching interstate cars in a yard or delivering interstate cars by a terminal company is engaging in interstate commerce, all switchmen so employed are within the Act.

"In this connection attention will be called to what is said by the Delaware Court in the case of *Winkler v. Philadelphia Railway*, 4 Penn. (Del.) 80; 53 Atl. 90. This was an action for damages. *Winkler* is described as head brakeman of a shifting crew

which was using shifting engine Number 1242 and its tender in moving and delivering interstate commerce cars at the siding on the south side of Wilmington, the railroad, defendant, then and there being a common carrier of passengers and freight. In charging the jury the court said:

"If the tender and car were then in use in moving local traffic only, from point to point within the limits of this state, they could not be engaged in interstate commerce. If, however, the car being moved had come from a point out of the state with freight to be here delivered it would be moving interstate commerce. This would be so even though the car to which the tender was being coupled was not the car used in interstate traffic, if the removal of such a car was a necessary step in getting out and moving said interstate car.'

"In this connection attention may also be called to the case of *Kansas City Ry. v. Flipppo*, 138 Ala. 487; S. C. 35 Sou. 457.

"If Justice Brewer is right in his opinion in *Chicago R. L. & P. R. R. v. Stahley*, 62 F. R. 363, it would seem that all persons employed in round houses, and all persons employed in maintaining the track, and, it would follow, bridges, would be within the act. On the other hand, persons employed in the machine shops of the company, constructing or repairing its rolling stock, would not be within the act. And in this connection, as to car repairers, attention is called to what was said by Judge *Lurton*, as

he can. The test is, "was the servant injured while engaged in interstate commerce by the negligence of his employer?" If he was, he may recover, and it matters not that the servant inflicting the injury was engaged only in intrastate commerce. It would be just as logical to claim that the company was not liable because he was injured by an instrument not used in interstate commerce, for which no one would seriously contend. Such an instance would be where an employe is injured by the collision of his train with an intrastate train. A rule that there could be no recovery in such instances would to a great extent nullify the usefulness and object of the statute. Whenever it is a necessary incident to the regulation of interstate commerce, Congress can control, to that extent, intrastate commerce. Unquestionably Congress can, if necessary to protect interstate employes, treat interstate employes simply as employes of the company and impute their negligence to the company. Nor can it be claimed that the act is void because it invades, on this point, the police power of the state and because the United States has no police power; for, although the police power of the state is ostensibly exclusive to it, and the Federal Government has no police power in itself, yet Congress may, under the constitution, pass all laws which are essential to make effective the powers belonging to it. If it, therefore, becomes essential for Congress to exercise powers that invade police regulations of a state, for the purpose of making effective its powers, it may do so.

given above, in *St. Louis & S. F. Co. v. Delk*, 158 F. R. 939.

"As for car builders and repairers, clerks in freight offices and in general offices, we believe that they will not be held to be within the reason of the act, and, there-

fore, not entitled to its benefits. We believe that the same principle will be applied to freight handlers. We believe, however, that the Act will be held to apply to all persons engaged in the operation and physical maintenance of the road."

## CHAPTER IV.

### CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK.

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§ 25. **Contributory negligence—Statute.**—Section 3, of the statute provides as follows: "That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe: *Provided*, That no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe."<sup>1</sup>

<sup>1</sup>Sec. 3 of statute. Sections 3 and 4 fall within a class of legislation finding its authority in the exercise of a reasonable police power by the legislature in regu-

lating the relations of master and servant. It is pretty well conceded that those sections are constitutional.

**§ 26. Assumption of risk—Statute.**—"That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of the employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe."<sup>2</sup>

**§ 27. Exceptions—Statute.**—"That nothing of this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employes under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress, entitled 'An act relating to liability of common carriers in the District of Columbia and territories, and to common carriers engaged in commerce between the states and between the states and foreign nations to their employes,' approved June 11, 1906."<sup>3</sup>

**§ 27a. To what "statute" reference is made.**—The "statute" referred to in the two preceding sections is a statute of the United States and not a statute of a state or an ordinance of a municipality. To construe the word "statute" to mean a state statute would render the Employers' Liability Act of uneven effect throughout the United States and perhaps render it obnoxious to the Fifth Amendment of the Constitution, and also, no doubt in many instances extending the power of Congress over interstate commerce to cases not falling within the scope of interstate commerce. But this does not dispose of the railway company's liability to an employe where his injuries were occasioned by the company's violation of a valid state stat-

<sup>2</sup>Sec. 4 of statute.

<sup>3</sup>Sec. 8 of statute. The last statute referred to is the one that was declared unconstitutional in

Johnson v. Southern Pac. Co. 196 U. S. 1; 25 Sup. Ct. Rep. 158; 49 L. Ed. 363; reversing 54 C. C. A. 508; 117 Fed. Rep. 462.

ute. As for instance, the failure of a locomotive engineer to give the required state statutory signals at a railway or highway crossing whereby a collision with another train or a traveler is occasioned, the train derailed and an employe on the train is injured. Other instances might possibly be suggested. In such an instance, no doubt, the state statute could be pleaded to show the statutory negligence of the railway company and thus give the employe a cause of action which possibly he might not otherwise have had.<sup>3\*</sup>

**§ 28. Contributory negligence as a defense.**—A careful reading of this section will show that contributory negligence is no longer a complete defense as it was at the common law, but is still a partial defense. As a complete defense all the rules of the common law are erased at one sweep of the legislative pen; and although an employe is guilty of contributory negligence he may still recover. But those rules are still in force for the purpose of determining the quantum of damages the employe may recover; for whatever at common law was contributory negligence is still to be considered in determining the relative amount of the employe's negligence as compared with that of the employer.<sup>4</sup>

<sup>3\*</sup> This is the logical conclusion of the Howard case, cited herein as the Employers' Liability cases, 207 U. S. 463; 28 Sup. Ct. Rep. 143, affirming 148 Fed. Rep. 997. Some little analogy can be drawn from the case of *Wayman v. Southard*, 10 Wheat. 1, holding that the Kentucky law of executions, passed subsequent to the Federal Process Act, were not applicable to executions which issued on judgments rendered by Federal courts. See also *Mutual Life Ins. Co. v. Prewitt*, 31 Ky. L. Rep. 1319; 105 S. W. Rep. 463.

That the word "statute" does not include municipal ordinance,

see *Rutherford v. Swink*, 96 Tenn. 546; 35 S. W. Rep. 554, and *People v. Harrison*, 223 Ill. 544; 79 N. E. Rep. 164.

<sup>4</sup> The statute "permits a recovery by an employee for an injury caused by the negligence of a co-employee; nor is such a recovery barred, even though the injured one contributed by his own negligence to his injury. The amount of the recovery, however, is diminished in the same degree that the negligence of the injured one contributed to the injury. It makes each party responsible for his own negligence, and requires

**§ 29. Contributory negligence defined.**—In South Carolina the following definition of contributory negligence has been given: "Contributory negligence is the want of ordinary care on the part of the person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred."<sup>5</sup>

**§ 30. Common law rule of contributory negligence preventing a recovery.**—The common law rule of contributory negligence which prevents plaintiff recovering damages has been very succinctly stated by the New Jersey Supreme Court as follows: "In this state the established rule is that if the plaintiff's negligence contributed to the injury, so that, if he had not been negligent, he would have received no injury from the defendant's negligence—the plaintiff's negligence being proximately a cause of the injury—he is without redress, unless the defendant's act was a willful

each to bear the burden thereof." 60 Cong. Rec., 1st Sess., p. 4434. See Appendix B.

"It appears to me that two employees, by slight negligence, might bring on an accident that would kill 50 or 100 passengers; that they would contribute the negligence that produced the accident, and they would recover for their own negligence. That is absolutely true, if I understand the bill, and we do not want to pass such a bill. It almost puts a premium upon a conspiracy among employees to be guilty of negligence that they can take advantage of their own negligence and kill a hundred people besides. That is the effect of the bill." Senator Elkins, of West Virginia. 60 Cong. Rec., 1st Sess., p. 4534.

"It suggests the very anomalous

situation that a passenger pays his fare, and if he contributes to his own injury, he cannot recover, while two employees paid to conduct him safely may by their negligence cause an accident and kill many persons, and yet they can recover." Senator Smith, of Michigan. *Ibid*, p. 4535.

<sup>5</sup> *Cooper v. Ry. Co.* 56 S. C. 91; 34 S. E. 18; approved in *Webster v. Atlantic, etc., R. Co.* (S. C.) 61 S. E. 1080.

This statute cannot be so turned around as to give an employee a right of action because of his own contributory negligence, on the theory that his own negligence, resulting in his injury, is the negligence of the railroad company. Such a construction leads to an absurdity.



trespass, or amounted to an intentional wrong, and in such a case the comparative degree of negligence of the parties will not be considered.<sup>6</sup> In the trial of cases of this kind,<sup>7</sup> where it appears that both parties were in fault, the primary consideration is that whether the faulty act of the plaintiff was so remote from the injury as not to be regarded, in a large sense, as a cause of the accident, or whether the injury was proximately due to the plaintiff's negligence, as well as to the negligence of the defendant. If the faulty act of the plaintiff simply presents the condition under which the injury was received, and was not, in a legal sense, a contributory cause thereof, then the sole question will be whether, under the circumstances, and in the situation in which the injury was received, it was due to the defendant's negligence. But if the plaintiff's negligence proximately—that is, directly—contributed to the injury, it will disentitle him to a recovery, unless the defendant's wrongful act was willful, or amounted to an intentional wrong. A court of law cannot undertake to apportion the damages arising from an injury caused by the co-operating negligence of both parties, or to determine the comparative negligence of each.”<sup>8</sup>

**§ 31. Definitions of degrees of negligence.**—In an early day the Supreme Court of Kansas adopted the rule of comparative negligence, and in discussing the law of negligence the court gave the following definitions and made the following observations: “There may be a high degree of diligence, a common degree of diligence, and a slight degree of diligence, with their corresponding degrees of negligence, and these can be clearly enough defined for all practical purposes, and, with a view to the business of life, seems to be all that are really necessary. Common or ordinary diligence

<sup>6</sup> Citing *New Jersey Exp. Co. v. Nichols*, 33 N. J. L. 435; *Pennsylvania R. Co. v. Righter*, 42 N. J. L. 180.

carelessly into a transit or surveyor's compass standing in the highway.

<sup>7</sup> *State v. Lauer*, 55 N. J. L. 205; 26 Atl. 180; 20 L. R. A. 61.

<sup>8</sup> Driving a team and wagon

is that degree of diligence which men in general exercise in respect to their own concerns; high or great diligence is, of course, extraordinary diligence, or that which very prudent persons take of their own concerns; and low or slight diligence is that which persons of less than common prudence, or, indeed, of any prudence at all, take of their own concerns. Ordinary negligence is the want of ordinary diligence; slight, or less than ordinary negligence, is the want of great diligence; and gross or more than ordinary negligence is the want of slight diligence. \* \* \* Whoever exercises slight care, and no more, is guilty of ordinary negligence; whoever exercises less than slight care is guilty of gross negligence, and may be guilty of willful and wanton wrongs. Whoever exercises great care is guilty of less than slight negligence, and may not be guilty of any negligence at all.'''

§ 32. **Comparative negligence.**—The provisions of Section three radically change the common law rule, and it is said to have introduced the rule of comparative negligence, especially as administered in the state of Georgia. That is true in a measure. If the employe has been guilty of negligence in contributing to his injuries, then, under this statute, his negligence must be compared with that of his employer in determining the measure of his damages, and to that extent the statute has introduced the rule of comparative negligence, but in a modified condition as will appear in subsequent sections.

§ 33. **Origin of rule of comparative negligence.**—In Illinois comparative negligence was first announced in 1858 by Justice Breese after a careful consideration of several English cases.<sup>10</sup> The rule of comparative negligence was enforced

<sup>9</sup> Union Pacific Ry. Co. v. Rollins, 5 Kan. 167; Sawyer v. Sauer, 10 Kan. 466; Kansas Pacific Ry. Co. v. Pointer, 14 Kan. 37; Kansas

R. Co. v. Plovey, 29 Kan. 169; Atchison etc., R. Co. v. Henry, 57 Kan. 154.

<sup>10</sup> Galena, etc., R. Co. v. Jacobs, 20 Ill. 478.

in that state, with many vicissitudes, until the common law rule of contributory negligence was finally adopted, thereby overruling a long line of cases, establishing a doctrine with many refinements, and which, judging from the many errors pointed out in the supreme and appellate courts of that state, were never fully understood by all the *nisi prius* judges and members of the bar of that state.<sup>11</sup> In the early decisions of Kansas the rule also prevailed where the negligence of the injured person was slight and that of the culpable individual gross in comparison.<sup>12</sup> In that state, however, the rule has been abrogated.<sup>13</sup> In Georgia the rule was adopted at an early day, perhaps not in the same sense as the Illinois rule, but with so slight a distinction as to result in practice to little difference.<sup>14</sup> In one case it is said that the rule adopted in that state is the rule that prevails in admiralty.<sup>15</sup> The several decisions of the Georgia Supreme Court resulted in the productions of three sections of the code of that state, varying in their terms as applied to different conditions under which the injuries were inflicted.

**§ 34. Georgia statutes.**—The following are the sections of the Georgia code from which some of the provisions of

<sup>11</sup> That the rule of comparative negligence is no longer in force, see *Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9; 40 N. E. Rep. 938; *City of Lanark v. Dougherty*, 153 Ill. 163; 38 N. E. Rep. 892; *Cicero, etc., St. Ry. Co. v. Meixner*, 160 Ill. 320; 43 N. E. 823; 31 L. R. A. 331; *Cleveland, etc., Ry. Co. v. Maxwell*, 59 Ill. App. 673; *Atchison, etc., Ry. Co. v. Feehan*, 149 Ill. 202; 36 N. E. Rep. 1036; *Illinois, etc., R. Co. v. Ashline*, 56 Ill. App. 475; *Calumet, etc., Co. v. Nolan*, 69 Ill. App. 104.

<sup>12</sup> *Caulkins v. Mathews*, 5 Kan.

191; *Union Pac. Ry. Co. v. Rollins*, 5 Kan. 167; *Sawyer v. Sauer*, 10 Kan. 466.

<sup>13</sup> *Atchison, etc., R. Co. v. Henry*, 57 Kan. 154; 45 Pac. Rep. 576.

<sup>14</sup> For origin of rule, see *Macon, etc., R. Co. v. Denis*, 18 Ga. 684; *Central, etc., R. Co. v. Denis*, 19 Ga. 437; *Macon, etc., R. Co. v. Davis*, 28 Ga. 111; *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409, 431; *Central R. Co. v. Brinson*, 70 Ga. 207.

<sup>15</sup> *Macon, etc., R. Co. v. Winn*, 26 Ga. 250; see *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409, 432.

the Federal Employers' Liability Act were drawn: "No person shall recover damages from a railroad company for injury to himself or his property where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him."<sup>16</sup> "If the person injured is himself an employe of the railroad company, and the damage was caused by another employe, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery."<sup>17</sup> "If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. But in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained."<sup>18</sup>

**§ 35. Differs from Federal statute.**—Read together these three sections of the Georgia code differ to some extent in the rule they set forth from that adopted in the Federal statute. Thus, the latter statute does not require in any of its provisions that the injured employe must have been in the exercise of due care or any care, but in Section 3830 of the former if he "by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. But in other cases the defendant is not relieved, although the plaintiff may in some way

<sup>16</sup> Georgia Code, 1895, Sec. 2322. It will be noted that by this section negligence of the injured person contributing to the injury will not bar a recovery, but will reduce the amount he would otherwise be entitled to recover.

<sup>17</sup> Georgia Code, 1895, Sec. 2323. In this section it will be noted that the common law rule of the negligence of a fellow servant is

abrogated; but the injured employee must be free from negligence contributing to his injury.

Under this section if the servant injured was himself at fault, he cannot recover; nor can the damages under this section be apportioned. East Tennessee, etc., R. Co. v. Maloy, 77 Ga. 237.

<sup>18</sup> Georgia Code, 1895, Sec. 3830.

have contributed to the injury sustained." Section 2322 declares that the plaintiff shall not recover when the injury to himself "is caused by his own negligence," and then adds that if he and the agents of the railway company be both at fault, he may recover, the damages to be diminished by the jury "in proportion to the amount of default attributable to him." In the section abrogating the fellow servant rule (Section 2323) where he is injured by a fellow servant, he must be "without fault or negligence." It may be well to consider the construction the Georgia Supreme Court has put upon these three sections when taken together.

**§ 36. Georgia statutes construed.**—After quoting the three sections of the Georgia code, the Supreme Court of that state put this construction upon them: "It will be seen that, although the presumption is always against the [railroad] company, yet it may rebut that presumption and relieve itself of damages by showing that [1] its agents have exercised all ordinary and reasonable care and diligence to avoid the injury, or [2] it may show that the damage was caused by the plaintiff's own negligence; or [3] it may show that the plaintiff by ordinary care, could have avoided the injury to himself, although caused by the defendant's negligence. Upon either of these grounds the defendant may rest his defense. But these rules of law will not cover the facts of every case, for it may be that both the plaintiff and the agents of defendant are at fault, and when they are, then, whilst damages may be recovered, they are to be diminished by the jury in proportion to the default of the plaintiff for his want of ordinary care in avoiding the injury to himself."<sup>19</sup> In this same case, in a concurring opinion, it is said: "Where one causes the injury by going where he had no excuse to go, as one of ordinary sense, as under a car in motion, or consents to it by lying down deliberately on

<sup>19</sup> *Central R. Co. v. Brinson*, 64 Georgia, etc., R. Co. v. *Thomas*, Ga. 479; approved, *Savannah, etc.*, 68 Ga. 744.  
*R. Co. v. Stewart*, 71 Ga. 427;

- the track and being run over, and in such cases as these, Section 3034<sup>20</sup> applies, because his consent or his own negligence was the sole cause of the injury to his person. But where one is on a track, walking along, though a trespasser in one sense of the word, yet entitled to protection as a human being, and a train of cars comes rushing on toward him, and the danger is impending, but by ordinary care he can step off and save himself from the consequences of the negligence of the conductor in running out of time, then Section 2972<sup>21</sup> applies; and if he does not step off, he cannot recover. It must be borne in mind that both the principles of defense in Section 2972 and in 3034 are qualified in [these] sections respectively. The qualification in Section 2972 is this: 'But in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained'; and the qualification in Section 3034 is: 'If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of the default attributable to him.' Both contain the doctrine of contributory negligence and the effect of it. That effect is more plainly marked in Section 3034 than in Section 2972, yet is seen in each. In Section 3034 the meaning is that where the negligence of the complainant is the sole cause, he cannot recover at all; if it be in part the cause and negligence of the company in part the cause, then he may recover in part. In Section 2972 the meaning is substantially the same, as applicable to the danger impending. Though the plaintiff may have contributed in some way to the peril impending—'the injury sustained' by him in consequence of it—yet he may recover, if he could not, by ordinary

<sup>20</sup> "No person shall recover damages from a railroad company for injury to himself or property where the same is done by his consent or is caused by his own negligence." Sec. 3034 is now Sec. 2322.

<sup>21</sup> "If the plaintiff, by ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover." Sec. 2072 is now Sec. 3830.

care, have got out of the peril and escaped the injury. Recover what? And the company 'relieved to what extent?' Certainly to the extent of plaintiff's contributory blame the company is relieved, and the plaintiff may recover damages less the just apportionment or proportionment of his own contributory fault."<sup>22</sup> "Construing those three sections in *pari materia*, as one law, relating to injuries done to persons by railroads, the obvious meaning is that the company shall be liable for injuries done by their agents, in running trains or otherwise, in their service and employment, but when the person injured is wholly at fault, even if not himself an employe, he shall recover nothing; if partly at fault, he shall recover less than full damages, to be fixed by a jury; if an employe, he must be blameless to recover at all, but if blameless, the fact that he is a servant of the company shall not bar his recovery."<sup>23</sup>

**§ 37. Contributory negligence of plaintiff before defendant's negligence began.**—In Georgia, under the Code, the plaintiff's negligence which contributes to the injury and which bars a recovery must be such negligence of his as arises after the negligence of the defendant began or was existing, to the plaintiff's knowledge. "A party cannot be charged with the duty of using any degree of care or diligence to avoid the negligence of a wrongdoer until he has reason to apprehend the existence of such negligence. No one can be expected to guard against what he does not see and cannot foretell. The rule, therefore, which requires one to exercise care and diligence to avoid the consequences of another's negligence, necessarily applies to a case where there is opportunity of exercising this diligence after the negligence has begun and has become apparent."<sup>24</sup> The rule

<sup>22</sup> Savannah, etc., R. Co. v. Stewart, 71 Ga. 427.

<sup>23</sup> Thompson v. Central R. Co. 54 Ga. 509; Central Ry. Co. v. Brinson, 70 Ga. 207; Savannah, etc., R. Co. v. Stewart, 71 Ga. 427.

<sup>24</sup> Macon, etc., Ry. Co. v. Holmes, 103 Ga. 658; 30 S. E. 563; Comer v. Barfield, 102 Ga. 489; 34 S. E. 90; Savannah, etc., Ry. Co. v. Day, 91 Ga. 676; 17 S. E. 959; Central, etc., R. Co. v. At-

has thus been stated: "The duty imposed by law upon all persons to exercise ordinary care to avoid the consequences of another's negligence does not arise until the negligence of such other is existing, and is either apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence. In such cases, and in such cases only, does the failure to exercise ordinary care to escape the consequences of negligence entirely defeat a recovery. In other cases (that is, where the person injured by the negligence of another is at fault himself, in that he did not, before the negligence of the other became apparent, or before the time arrived when, as an ordinarily prudent person, it should have appeared to him that there was reason to apprehend its existence, observe that amount of care and diligence which would be necessary under like circumstances by an ordinarily prudent person), such fault or failure to exercise due care or diligence at such time would not entirely preclude a recovery, but would authorize the jury to diminish the damages 'in proportion to the amount of default attributable' to the person injured. "This rule [of comparative negligence] authorizes a recovery by the plaintiff, although he was at fault, provided he was injured under circumstances where, by the exercise of care on his part, he could not have avoided the consequences of the defendant's negligence. If the plaintiff knows of the defendant's negligence, and fails to exercise that care and caution which an ordinarily prudent man would exercise under similar circumstances to prevent an injury which will result from such negligence, it is well settled he cannot recover. If the negligence of the defendant was existing at the time that plaintiff was hurt, and he, in the exercise of that degree of care and caution which an ordinarily prudent person would exercise under similar circumstances, could have discovered the de-

taway, 90 Ga. 661; 16 S. E. 956; *Americus, etc., Ry. Co. v. Luckie*, 87 Ga. 6; 13 S. E. 105; *Brunswick, etc., R. Co. v. Gibson*, 97 Ga. 497; 25 S. E. 484.



defendant's negligence, and when discovered could, by the exercise of a like degree of care, have avoided the same, then he cannot recover. If at the time of the injury an ordinarily prudent person, in the exercise of that degree of care and caution which such a person generally uses, would reasonably have apprehended that the defendant might be negligent at the time when, and place where the injury occurred, and, so apprehending the probability of the existence of such negligence, could have taken steps to have prevented the injury, then the person injured cannot recover, if he failed to exercise that degree of care and caution usually exercised by an ordinarily prudent person to ascertain whether the negligence which might have been reasonably apprehended really existed. If there is anything present at the time and place which would cause an ordinarily prudent person to reasonably apprehend the probability, even if not the possibility, of danger to him in doing an act which he is about to perform, then he must take such steps as an ordinarily prudent person would take to ascertain whether such danger exists, as well as to avoid the consequences of the same after its existence is ascertained; and if he fails to do this, and is injured,<sup>25</sup> he will not be allowed to recover, if by taking proper precautions he could have avoided the consequences of the negligence of the person inflicting the injury."<sup>26</sup>

**§ 38 Burden on plaintiff to show freedom from his own fault.**—In all the Illinois cases, the burden is upon the plaintiff to show his freedom from fault contributing to the injury, although some negligence on his part will not defeat him. "In all those cases,"<sup>27</sup> says the Supreme Court of that state,

<sup>25</sup> Because of such failure.

<sup>26</sup> *Western, etc., Ry. Co. v. Ferguson*, 113 Ga. 708; 39 S. E. 306; *Freeman v. Nashville, etc., Ry. Co.* 120 Ga. 469; 47 S. E. 931; *Western, etc., Ry. Co. v. York*, 128 Ga. 687; 58 S. E. Rep. 183;

*Atlanta, etc., Ry. Co. v. Gardner*, 122 Ga. 82; 49 S. E. Rep. 818.

<sup>27</sup> *Galena, etc., R. Co. v. Woodward*, 15 Ill. 469; *Galena, etc., R. Co. v. Fay*, 16 Ill. 567; *Galena, etc., R. Co. v. Jacobs*, 20 Ill. 485.

"this court held, in Jacob's case,<sup>28</sup> that two things must concur to support this action, negligence on the part of the defendant, and no want of ordinary care on the part of the plaintiff, and the question of liability does not absolutely depend on the absence of all negligence on the part of the plaintiff, but upon the relative degree or want of care as manifested by both parties."<sup>29</sup>

**§ 39. Charge to jury under Georgia Code.**—The following instruction to the jury was held to be erroneous: "If, by the exercise of ordinary care and diligence, the plaintiff could have avoided the consequences to herself of the defendant's negligence, she cannot recover; but if both parties were at fault, and the alleged injury was the result of the fault of both, then, notwithstanding the plaintiff's negligence, she would be entitled to recover, but the amount of the recovery would be abated in proportion to the amount of the default on her part." The error consisted in stating, without proper explanation and in immediate connection with each other, two distinct rules of law, and thus qualifying the former by the latter, contrary to the purpose of the Georgia code. But the Supreme Court said that the following instruction would be correct: "If, by the exercise of ordinary care and diligence, the plaintiff could have avoided the consequences to herself of the defendant's negligence, she cannot recover; but if both parties were at fault, and the alleged injury was the result of the fault of both, and you find from the evidence that the plaintiff could not by ordinary care have avoided the alleged injury to herself, occasioned by defendant's negligence, then, notwithstanding she may have been to some extent negligent, she would be entitled to recover. But the amount of damages should be apportioned to the amount of the default on her part."<sup>30</sup>

<sup>28</sup> Galena, etc., R. Co. v. Jacobs, 20 Ill. 478.

<sup>29</sup> Chicago, etc., R. Co. v. Hazard, 26 Ill. 373.

<sup>30</sup> Americus, etc., R. v. Luckie, 87 Ga. 6; 13 S. E. 105; Brunswick, etc., R. Co. v. Gibson, 97 Ga. 489; 25 S. E. 484; Cain v.

§ 40. **Recovery by a railway employe.**—Speaking of the deceased's acts for whose death an action had been brought to recover damages, the Supreme Court of Georgia said: "He was an employe of the road. It is to be presumed, therefore, that he well knew that the platform on which he was, when killed, was a place of extra danger. In addition to this he was told by the conductor that the place was one of danger, that he was violating a rule of the road, and that he must come inside. This he disregarded and was killed, whilst another young man, who was with him, heeded it, went inside the car, and escaped unhurt. Ought he, or those standing in his right, under such circumstances, to recover full damages, to recover as much as if he had been guilty of no negligence himself? We think not. We will not undertake to say how much such conduct as this ought to reduce the recovery, but we will say that it ought to reduce it much." <sup>31</sup>

§ 41. **Widow recovering for death of her husband—Georgia statute—Contributory negligence of deceased.**—In Georgia a statute allows a recovery by a widow for the death of her husband if the death was caused by the negligence of the defendant, and the injury was occasioned "without fault or negligence on the part of the person injured." <sup>32</sup> In construing this clause the Supreme Court of that state says: "If the deceased immediately or remotely, directly or indirectly, caused the injury, or any part of it, or contributed to it at all, his wife could not recover." <sup>33</sup>

Macon, etc., R. Co. 97 Ga. 298; 22 S. E. 918; Macon, etc., Ry. Co. v. Holmes, 103 Ga. 655; 30 S. E. 563.

<sup>31</sup> Youge v. Kinney, 28 Ga. 111; Macon, etc., R. Co. v. Johnson, 38 Ga. 409; Hendricks v. Western, etc., R. Co. 52 Ga. 467; South-western R. Co. v. Johnson, 60 Ga. 667.

<sup>32</sup> Georgia Civil Code, Sec. 2323.

<sup>33</sup> Prather v. Richmond, etc., R. Co. 80 Ga. 427; 9 S. E. 530; 12 Am. St. Rep. 263; approved in Western, etc., R. Co. v. Herndon, 114 Ga. 168; 39 S. E. 911; Blackstone v. Central Ry. Co. 102 Ga. 489; 31 S. E. 90; Chattanooga S. R. Co. v. Myers, 112 Ga. 237; 37 Ga. 439; Walker v. Atlanta, etc.,

§ 42. **Apportionment of damages.**—In commenting upon the apportionment of damages according to the fault of the parties, the Supreme Court of Georgia said: "If the plaintiff neither consented to, nor caused the injury, care and diligence of the company's agents must be shown to have been ordinary and reasonable. No less degree will suffice for complete exoneration. If that degree cannot be established, the plaintiff must recover something, and the question will be whether his recovery can be reduced to partial compensation only. But one thing will so reduce it, and that is proof of contributory negligence on his part. For the same reason that recovery is wholly defeated when his negligence is shown to have been the sole cause of the injury, it will be defeated in part when his negligence is shown to have been part of the cause. However slight it will count against him, and though the company be chargeable with something, he, on the other hand, must lose something. For the apportionment of damages according to the relative fault of the parties, there seems to be no standard more definite than the enlightened opinion of the jury. But it should not be overlooked that the defendant is not to be deemed in fault at all, unless there was a failure to exercise ordinary care or reasonable diligence. For simply falling short of extreme and ordinary care and diligence, the defendant is not liable, even to contribute."<sup>34</sup> But "for simply falling short of

R. Co. 103 Ga. 826; 30 S. E. 503; Georgia, etc., R. Co. v. Hicks, 95 Ga. 301; 22 S. E. 613; Georgia, etc., R. Co. v. Hallman, 97 Ga. 317; 23 S. E. 73; Georgia, etc., R. Co. v. Hicks, 95 Ga. 302; 22 S. E. 613.

<sup>34</sup> Georgia, etc., Co. v. Neely, 56 Ga. 580; Atlanta, etc., R. Co. v. Ayers, 53 Ga. 12.

If both plaintiff and defendant are at fault, the damages are to be diminished in proportion to the fault attributable to the

plaintiff. Central R. Co. v. Brinson, 64 Ga. 475; Atlanta, etc., R. Co. v. Wyly, 65 Ga. 120; Georgia R. v. Pittman, 73 Ga. 325; Brunswick, etc., R. Co. v. Hoover, 74 Ga. 426; Augusta, etc., R. Co. v. Killian, 79 Ga. 236; 4 S. E. 164; Southern Cotton Oil Co. v. Skipper, 125 Ga. 368; 54 S. E. Rep. 110; Hill v. Callahan, 82 Ga. 113; 8 S. E. Rep. 730; Pierce v. Atlanta Cotton Mills, 79 Ga. 782; 4 S. E. Rep. 381; Ingraham v. Hilton, etc., Co. 108 Ga. 194; 33

extreme and extraordinary care and diligence, the defendant is not liable even to contribute."<sup>35</sup> "If the plaintiff, by the exercise of ordinary care, could have avoided the consequences to himself of the defendant's negligence, he cannot recover at all. But in other cases (that is, in cases where, by ordinary care, he could not have avoided the consequences of defendant's negligence), the circumstances that the plaintiff may have, in some way, contributed to the injury, shall not entirely relieve the defendant, but the damages shall be apportioned according to the amount of the default attributable to each."<sup>36</sup>

**§ 43. An epitome of the Georgia cases.**—The following is an epitome of the Georgia cases: The plaintiff must have used ordinary care to avoid the injury;<sup>37</sup> the burden is upon

S. E. Rep. 961; *Glaze v. Josephine Mills*, 119 Ga. 261; 46 S. E. Rep. 99; *Wrightsville, etc., Co. v. Gornite*, 129 Ga. 204; 58 S. E. Rep. 769.

"For the apportionment of damages according to the relative fault of the parties, there seems to be no standard more definite than the enlightened opinion of the jury." *Georgia, etc., Co. v. Neely*, 56 Ga. 540.

<sup>35</sup> *Georgia, etc., Co. v. Neely*, 56 Ga. 540.

<sup>36</sup> *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409; *Younge v. Kinney*, 28 Ga. 111. *Alabama, etc., R. Co. v. Coggins*, 88 Fed. Rep. 455; 32 C. C. A. 1.

<sup>37</sup> *Branan v. May*, 17 Ga. 136; *Macon, etc., Ry. Co. v. Winn*, 19 Ga. 440; *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409, 431; *Mayor, etc., v. Dodd*, 58 Ga. 238; *Georgia R. Co. v. Thomas*, 68 Ga. 744; *Augusta, etc., R. Co. v. Killian*, 79 Ga. 236; 4 S. E. 164; *Ameri-*

*cus, etc., R. Co. v. Luckie*, 87 Ga. 7; 13 S. E. 105; *Central R. Co. v. Abtaway*, 90 Ga. 65; 16 S. E. Rep. 956; *Brunswick, etc., R. Co. v. Gibson*, 97 Ga. 497; 25 S. E. Rep. 484; *Central R. Co. v. Attaway*, 90 Ga. 661; 16 S. E. 958; *Comer v. Barfield*, 102 Ga. 489; 31 S. E. Rep. 90; *Georgia, etc., R. Co. v. Nilus*, 83 Ga. 70; 9 S. E. Rep. 1049; *Macon, etc., R. Co. v. Holmes*, 103 Ga. 658; 30 S. E. Rep. 565; *Jenkins v. Central R. Co.* 89 Ga. 756; 15 S. E. Rep. 655; *Atlanta, etc., R. Co. v. Loftin*, 86 Ga. 43; 12 S. E. Rep. 180; *Western, etc., R. Co. v. Bloomingdale*, 74 Ga. 604; *Lovier v. Central, etc., R. Co.* 71 Ga. 222; *Higgins v. Cherokee R. Co.* 73 Ga. 140; *Tift v. Jones*, 78 Ga. 700; 3 S. E. Rep. 399; *Richmond, etc., R. Co. v. Howard*, 79 Ga. 44; 3 S. E. Rep. 426; *Comer v. Shaw*, 98 Ga. 545; 25 S. E. Rep. 733; *Briscoe v. Southern Ry. Co.* 103 Ga. 224; 28 S. E. Rep. 638; *Cent-*

him to show that fact.<sup>38</sup> The duty to use ordinary care does not arise until the negligence of the defendant is ex-

tral Ry. Co. v. Dorsey, 106 Ga. 826; 32 S. E. Rep. 873; Hopkins v. Southern Ry. Co. 110 Ga. 167; 35 S. E. Rep. 170; Western, etc., R. Co. v. Bradford, 113 Ga. 276; 38 S. E. Rep. 823; Georgia Cotton Oil Co. v. Jackson, 112 Ga. 620; 37 S. E. Rep. 873; Western, etc., R. Co. v. Ferguson, 113 Ga. 708; 39 S. E. Rep. 306; Porter v. Ocean S. S. Co. 113 Ga. 1007; 39 S. E. Rep. 470; Louisville, etc., R. Co. v. Thompson, 113 Ga. 983; 39 S. E. Rep. 483; Western, etc., R. Co. v. Herndon, 114 Ga. 168; 39 S. E. Rep. 911; Roberts v. Albany, etc., R. Co. 114 Ga. 678; 40 S. E. Rep. 698; Mansfield v. Richardson, 118 Ga. 250; 45 S. E. 269; Savannah, etc., Ry. Co. v. Hatcher, 118 Ga. 273; 45 S. E. Rep. 239; Central Ry. Co. v. McKinney, 118 Ga. 535; 45 S. E. Rep. 430; Wilkins v. Grant, 118 Ga. 522; 45 S. E. Rep. 415; Wrightsville, etc., R. Co. v. Lattimore, 118 Ga. 581; 45 S. E. 453; Ludd v. Wilkins, 118 Ga. 525; 45 S. E. Rep. 429; Edwards v. Central, etc., R. Co. 118 Ga. 678; 45 S. E. Rep. 462; Southern Ry. Co. v. Gore, 128 Ga. 627; 58 S. E. Rep. 180; Central Ry. v. McClifford, 120 Ga. 90; 47 S. E. Rep. 590; Little v. Southern Ry. Co. 120 Ga. 347; 47 S. E. Rep. 953; Griffith v. Lexington, etc., Ry. Co. 124 Ga. 553; 53 S. E. Rep. 97; Moore v. C. J. King Mfg. Co. 124 Ga. 576; 53 S. E. Rep. 107; Collins v. Southern Ry. Co. 124 Ga. 853; 53 S. E. Rep. 388; Central Ry. Co. v. Harper, 124 Ga. 836; 53 S. E. Rep. 391; Southern Ry.

Co. v. Brown, 126 Ga. 1; 54 S. E. Rep. 911; Cawood v. Chattahoochee, 126 Ga. 159; 54 S. E. Rep. 944; Wrightsville, etc., R. Co. v. Gornto, 129 Ga. 204; 58 S. E. 769; City of Americus v. Johnson, 2 Ga. App. 378; 58 S. E. Rep. 518; Southern Ry. Co. v. Gladner (Ga. App.), 58 S. E. Rep. 249; Vinson v. Willingham Cotton Mills, 2 Ga. App. 53; 58 S. E. Rep. 413; Southern Ry. Co. v. Rowe, 2 Ga. App. 557; 59 S. E. Rep. 462; Rolleston v. T. Cassier & Co., 3 Ga. App. 161; 59 S. E. Rep. 442; Central Georgia Ry. Co. v. Clay, 3 Ga. App. 286; 59 S. E. Rep. 843; Southern Ry. Co. v. Monchett, 3 Ga. App. 266; 59 S. E. Rep. 710; Sanders v. Central Ry. Co. 123 Ga. 763; 50 S. E. Rep. 728.

<sup>38</sup> Denol v. Central Ry. Co. 119 Ga. 246; 46 S. E. Rep. 107; Eagle, etc., Mills v. Herron, 119 Ga. 389; 46 S. E. Rep. 405; Macon, etc., Ry. Co. v. McLendon, 119 Ga. 297; 46 S. E. Rep. 106; Russell v. Central Ry. 119 Ga. 705; 46 S. E. Rep. 858; Columbus R. Co. v. Dorsey, 119 Ga. 363; 46 S. E. Rep. 635; Simmons v. Seaboard, etc., R. Co. 120 Ga. 225; 47 S. E. Rep. 570; Christian v. Macon, etc., Co. 120 Ga. 314; 47 S. E. Rep. 23; Southern Ry. Co. v. Bandy, 120 Ga. 463; 47 S. E. Rep. 923; Banks v. J. S. Schofield Sons' Co. 126 Ga. 607; 55 S. E. Rep. 39; Atlanta, etc., R. Co. v. O'Neil, 127 Ga. 685; 56 S. E. Rep. 986; Turley v. Atlanta, etc., R. Co. 127 Ga. 594; 56 S. E. Rep. 748; Roquemore v. Albany, etc., R. Co. 127

isting or is apparent, or circumstances are such that an ordinarily prudent person would have reason to apprehend its existence.<sup>39</sup> And in case of negligence on the part of both parties, the plaintiff may still recover if the defendant's was great.<sup>40</sup> If the defendant has been grossly negligent, the statute does not apply.<sup>41</sup> If both parties had equal opportunity to avoid the injury, no question of apportionment of

Ga. 330; 56 S. E. Rep. 424; Moore v. Dublin Cotton Mills, 127 Ga. 609; 56 S. E. Rep. 839; Southern Ry. Co. v. Dean (Ga.), 57 S. E. Rep. 702; Brown Store Co. v. Chattahoochee, 1 Ga. App. 609; 57 S. E. Rep. 1043; Sanders v. Central Ry. Co. 123 Ga. 763; 50 S. E. Rep. 728; Richmond R. Co. v. Mitchell, 92 Ga. 77; 18 S. E. Rep. 290; Savannah, etc., Co. v. Bell, 124 Ga. 663; 53 S. E. Rep. 109; City of Atlanta v. Harper, 129 Ga. 415; 59 S. E. Rep. 230.

\* Freeman v. Nashville, etc., Ry. Co. 120 Ga. 469; 47 S. E. Rep. 931; Western, etc., Ry. Co. v. York, 128 Ga. 687; 58 S. E. Rep. 183.

The following instruction has been approved by the Georgia court. "If the plaintiff, by ordinary care, could have avoided the consequence to himself caused by the defendant's negligence (if the evidence shows negligence on the part of the defendant), the plaintiff will not be entitled to recover. But if the plaintiff did use ordinary care, and if while in the use thereof, by reason of the defendant's negligence, he sustained injury, the defendant will not be relieved, although the plaintiff in some way may have contributed to the injury sustained."

Mayor, etc., v. Dodd, 58 Ga. 238; Macon, etc., R. Co. v. Davis, 18 Ga. 679.

\* Younge v. Kenney, 28 Ga. 111. In this case it was said: "The deceased may have been guilty of some negligence; this does not excuse the railroad, if they [the jury] believe the officers were greatly more at fault than the deceased."

"Although the plaintiff be somewhat in fault, yet if the defendant be grossly negligent, and thereby occasioned or did not prevent the mischief, the action may be maintained." Augusta, etc., R. Co. v. McElmurry, 24 Ga. 75; Macon, etc., Ry. Co. v. Davis, 18 Ga. 679; Brannan v. May, 17 Ga. 136; Macon, etc., R. Co. v. Winn, 19 Ga. 440.

\* Central, etc., R. Co. v. Smith, 78 Ga. 694; 3 S. E. Rep. 397; Central R. Co. v. Dixon, 42 Ga. 327; Southwestern R. Co. v. Johnson, 60 Ga. 667; Atlanta, etc., Ry. Co. v. Ayers, 53 Ga. 12. It defeats the action only when it amounts to a failure to use ordinary care. Rolleston v. T. Cassier & Co. 3 Ga. App. 161; 59 S. E. Rep. 442; Sims v. Macon, etc., Ry. Co. 28 Ga. 93. See Brown Store Co. v. Chattahoochee Lumber Co. 121 Ga. 809; 49 S. E. Rep. 839.

damages arises.<sup>42</sup> "For simply falling short of extreme and extraordinary care and diligence, the defendant is not liable even to contribute."<sup>43</sup>

<sup>42</sup> *Stewart v. Seaboard Air Line Ry.* 115 Ga. 624; 41 S. E. Rep. 981; *Wrightsville, etc., R. Co. v. Gornton*, 129 Ga. 204; 58 S. E. Rep. 769; *Central Ry. Co. v. McKinney*, 116 Ga. 13; 42 S. E. Rep. 229; *Hobbs v. Bowie*, 121 Ga. 421; 49 S. E. Rep. 285.

If the injury is occasioned by the injured servant violating his master's orders, he cannot recover. *Binion v. Georgia, etc., R. Co.* 118 Ga. 282; 45 S. E. Rep. 276.

That there can be no recovery where the plaintiff is guilty of contributory negligence, see *Louisville, etc., R. Co. v. Edmondson*, 128 Ga. 478; 57 S. E. Rep. 877; *Southern Ry. Co. v. Barfield*, 115 Ga. 724; 42 S. E. Rep. 95; *Nichols v. Tanner*, 117 Ga. 489; 43 S. E. Rep. 480; *Georgia, etc., Co. v. Henderson*, 117 Ga. 480; 43 S. E. Rep. 698; *Norfolk, etc., Ry. Co. v. Perrow*, 101 Va. 345; 43 S. E. Rep. 614; *Chenoll v. Palmer Brick Co.* 117 Ga. 106; 43 S. E. Rep. 443; *Steinhouser v. Savannah, etc., R. Co.* 118 Ga. 195; 44 S. E. Rep. 800; *McDonnell v. Central R. Co.* 118 Ga. 195; 44 S. E. Rep. 800; *McDonnell v. Central R. Co.* 118 Ga. 86; 44 S. E. Rep. 840; *Augusta, etc., R. Co. v. Snider*, 118 Ga. 146; 44 S. E. 1005; *Randolph v. Brunswick, etc., Ry. Co.* 120 Ga. 969; 48 S. E. Rep. 396; *Macon, etc., Ry. Co. v. Anderson*, 121 Ga. 666; 49 S. E. Rep. 791; *Macon, etc., Ry. Co. v. Barnes*, 121 Ga. 443; 49 S. E. Rep. 282; *Central Ry. Co. v. Price*, 121 Ga. 651; 49 S. E. Rep. 683;

*Atlanta, etc., Ry. Co. v. Weaver*, 121 Ga. 460; 49 S. E. Rep. 291; *Meeks v. Atlanta, etc., Ry. Co.* 122 Ga. 266; 50 S. E. Rep. 99; *Walker v. Georgia, etc., Co.* 122 Ga. 368; 50 S. E. Rep. 121; *Tucker v. Central Ry. Co.* 122 Ga. 387; 50 S. E. Rep. 128; *Southern Ry. Co. v. Cunningham*, 123 Ga. 90; 50 S. E. Rep. 979; *Nix v. Southern Ry. Co.* (Ga. App.) 61 S. E. Rep. 292; *Georgia, etc., Ry. Co. v. Sasser* (Ga. App.), 61 S. E. Rep. 998.

<sup>43</sup> *Georgia, etc., Co. v. Neely*, 56 Ga. 540.

In Tennessee comparative negligence is not the accepted rule, the courts holding that when the plaintiff's own negligence is the proximate cause of his injury he cannot recover. But if his negligence be slight, or if he has not exercised a superior degree of care or diligence, he may recover, his conduct being considered in mitigation of his damages. "The principal difference between our rule and the English rule, as modified by the more recent decisions, is in allowing the damages to be mitigated by the conduct of the injured party." *Railroad Co. v. Fain*, 12 Lea, 35; *Jackson v. Nashville, etc., R. Co.* 13 Lea, 491; 49 Am. Rep. 663; *Nashville, etc., R. Co. v. Wheelless*, 10 Lea, 741; 43 Am. Rep. 317; *Whirley v. Whiteman*, 1 Head, 610; *Duch v. Fitzhugh*, 2 Lea, 307; *Hill v. Nashville, etc., R. Co.* 9 Heisk. 823; *Nashville, etc., R. Co. v. Carroll*, 6 Heisk. 347; *Smith v. Nashville, etc., R. Co.* 6 Heisk. 174.



**§ 44. Comparative negligence in Illinois.**—In Illinois, after a long review of many cases in that state, as well as in other states and in England, in 1858, Justice Breese, as a deduction of the cases, lays down this rule: "It will be seen, from these cases, that the question of liability does not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care or want of care; as manifested by both parties, for all care or negligence is at best but relative, the absence of the highest possible degree of care showing the presence of some negligence, slight as it may be. The true doctrine, therefore, we think is, that in proportion to the negligence of the defendant, should be measured the degree of care required of the plaintiff; that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover. Although these cases do not distinctly avow this doctrine in terms, there is a vein of it perceptible, running through very many of them, as, where there are faults on both sides, the plaintiff shall recover, his fault being measured by the defendant's negligence, the plaintiff need not be wholly without fault, as in *Raisin v. Mitchell*<sup>44</sup> and *Lynch v. Nurdin*.<sup>45</sup> We say, then, that in this, as in all like cases, the degrees of negligence must be measured and considered, and whenever it shall appear that the plaintiff's negligence is comparatively slight,

The rule of comparative negligence does not prevail in Kentucky, as some suppose. *Louisville, etc., R. Co. v. Filbern*, 6 Bush, 574; *City of Covington v. Bryant*, 7 Bush, 248; *Louisville, etc., R. Co. v. Commonwealth*, 80 Ky. 143; 44 Am. Rep. 468; *Louisville, etc., R. Co. v. Collins*, 2 Duv. 114. Helm Bruce, Esq., of Louisville Bar, in *Kentucky Law Journal* for April, 1882; *Kentucky Bridges, etc., Co. v. Sydor*, 82 S.

W. Rep. 989; 26 Ky. L. Rep. 951; 68 L. R. A. 183.

In Florida, in an action against a railroad company, a statute provides that "if the complainant and the company are both at fault, the former may recover; but the damages shall be increased or diminished by the jury in proportion to the amount of default attributable to him." *Laws 1901, chap. 4071; General Statutes 1906, § 3149.*

<sup>44</sup> *Carr v. Payne* 252.

<sup>45</sup> 4 Eng. C. L. 422.

and that of the defendant gross, he shall not be deprived of his action." <sup>48</sup> In a subsequent Illinois case the court put this interpretation upon the doctrine of comparative negligence as it had been adopted three years before: "We only deem it necessary in this case, to examine the question whether the husband of appellee was guilty of such gross negligence as relieves the company from liability for his death. To authorize a recovery, it is not enough to simply show that the company was guilty of negligence, but it should also appear that deceased was not also guilty of negligence in some degree comparable to that of the company inflicting the injury.

<sup>48</sup> *Galena, etc., R. Co. v. Jacobs* (1858), 20 Ill. 478.

In *Raisin's* case the court summed up to the jury as follows: "The question is, whether the plaintiff has made out a case to entitle him to damages. You must be satisfied that the injury was occasioned by the want of care, or the improper conduct of the defendant, and was not imputable in any degree to any want of care or any improper conduct on the part of the plaintiff." The jury gave the plaintiff a verdict for two hundred and fifty pounds. Chief Justice Tindall then asked the jury how they had made up their verdict; and the foreman answered that there were faults on both sides. "Then," asked the Chief Justice, "you have considered the whole matter?" The foreman answered that they had.

Thereupon counsel for the defendant submitted to the court that the fact which the foreman had stated entitled the defendant to the verdict; but he was met by the statement of the Chief Justice: "No, there may be faults to a certain extent." In a note the reporter of the case says: "The

verdict in this case, as well as the opinion of the Chief Justice, seem to be quite correct, and sustainable in point of law, according to the most modern authorities."

In *Lynch v. Nurdin* the evidence showed that the defendant left his cart and horse unattended in a thronged thoroughfare, and the plaintiff, a child of seven years, got upon the cart in play. Another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt. Chief Justice Denman held that the plaintiff was liable in an action on the case, though the child was a trespasser and contributed to the injury by his own act; that though he was a co-operating cause of his own misfortune by doing an unlawful act, he was not deprived of his remedy; and that it was properly left to the jury whether the defendant's conduct was negligent and the injury caused by his negligence.

Chief Justice Denman, in commenting upon the case, concludes by saying: "His [the child's] misconduct bears no proportion to that of the defendant, which produced it."

Each party is bound, whilst pursuing their legal business, to exercise a due regard for the rights of others. And when each is equally at fault, and both parties negligent, the injured party has no right to recover for an injury he has thus contributed to produce. Each party must employ all reasonable means to foresee and prevent injury. Whether the party receiving the injury has acted with even a slight degree of negligence contributing to produce the injury, to recover he must show that the other party has been guilty of gross negligence. Whilst the party upon whom the injury is inflicted must use all reasonable care, he is not held to the highest degree of precaution of which the human mind is capable. Nor to recover, need he be wholly free from negligence, if the other party has been culpable.”<sup>47</sup>

**§ 45. Negligence a relative term.**—“In applying the measure of slight and gross negligence to the acts of the respective parties charged to have been negligent,” said Justice Scholfield of the Supreme Court of Illinois, “it is, of course, always to be held in remembrance that the term ‘negligence’ is, itself, relative, ‘and its application depends on the situation of the parties, and the degree of care and diligence which the circumstances reasonably impose.’”<sup>48</sup> The question, therefore, in the present instance, related to the measure of care, under the circumstances shown by the evidence to have existed, imposed upon the respective parties.<sup>49</sup> Whether, therefore, the plaintiff’s intestate failed

<sup>47</sup> Chicago, etc., R. Co. v. Dewey (1861), 26 Ill. 255. This was a case where the deceased attempted to pass between two sections of a freight train, in the night time, in order to reach an approaching passenger train he desired to board, and was caught between the bumpers of two freight cars of the two sections of the freight train backing up together, and

was killed. A recovery was denied, because the facts showed he was guilty of gross negligence and the defendant was not guilty of any negligence for its engineer had a right to presume no one would attempt to pass between the two freight train sections.

<sup>48</sup> Citing Cooley on Torts, 630.

<sup>49</sup> Chicago, etc., R. Co. v. Johnson, 103 Ill. 512.

to exercise ordinary care, is to be determined—and there can be no presumption under these circumstances otherwise—with reference to his rights, duties and obligations, and the rights, duties and obligations of the defendant, under the peculiar circumstances here in evidence. Being thus determined that he has failed to exercise ordinary care, the legal conclusion is, he is guilty of negligence.”<sup>50</sup>

**§ 46. Illinois rule extended.**—The rule of comparative negligence as first announced in Illinois, namely, “that there must be negligence on the part of the defendant, and no want of ordinary care on the part of the plaintiff, and where there has been negligence in both parties, still the plaintiff may recover, where his negligence is slight, and that of the defendant is gross, in comparison with that of the plaintiff,” was at a later period “extended to include cases where the negligence of the plaintiff had contributed in some degree to the injury complained of.” This was “upon the principle that, although a party may have himself been guilty of negligence, it does not authorize another to recklessly and wantonly destroy his property or commit a personal injury.”<sup>51</sup>

**§ 47.—Ordinary care wanting—Plaintiff's negligence slight.**—The fact that the negligence of the plaintiff was slight did not enable him to recover, if he had not observed ordinary care to avoid the injury and an instruction which omitted the statement that the plaintiff must have used ordinary care was held erroneous. “The fact that the defendant may have been guilty of gross negligence does not authorize a recovery. A duty rests on the injured party to exercise ordinary care, and, unless that duty has been observed, a recovery cannot be had. In other words, ordinary care is an essential element on the part of the injured party to authorize a re-

<sup>50</sup> Chicago, etc., R. Co. v. Johnson, 103 Ill. 512.

<sup>51</sup> Chicago, etc., R. Co. v. Van Patten, 64 Ill. 510; Chicago, etc.,

R. Co. v. Gretzner, 46 Ill. 75; Rockford, etc., R. Co. v. Coultas,

67 Ill. 398.

covery. But that element was omitted from the instruction [given]; and the jury was, in substance, told that the plaintiff, although guilty of some negligence, might recover, if the negligence of the defendant was gross, and the negligence of the plaintiff was slight, in comparison with the negligence of the defendant. We do not regard this as a correct proposition of law, or as a correct enunciation of the doctrine of comparative negligence. The plaintiff may have failed to exercise ordinary care when his acts and conduct are considered in the light of all the evidence, and yet, under the terms of this instruction, he might recover if his negligence was only slight when compared alone with that of defendant. In considering the doctrine of comparative negligence, expressions may be found in several cases which might sustain the instruction, where it has been said, in a general way, that an injured party, guilty of slight negligence, may recover, where the negligence of the defendant was gross, and the negligence of the plaintiff slight, in comparison with the negligence of the defendant but it has always been understood, and the declaration has always been made with the understanding that in no case can a recovery be had unless the person injured has exercised ordinary care for his safety."<sup>52</sup>

<sup>52</sup> Willard v. Swanson, 126 Ill. 381; 18 N. E. 548; affirming 12 Bradw. (Ill.) 631; Fisher v. Cook, 125 Ill. 280; 17 N. E. 763.

This instruction was held to be correct: "If the jury believe from the evidence that the plaintiff was injured as charged in the declaration, and that he or the person who was driving the buggy in which he sat was guilty of some negligence which contributed to said injury, but that said negligence of the plaintiff or of said person driving the buggy, if any, was slight, and that the defendant, by his servant, was guilty of

negligence, as charged in the declaration, and that said negligence, if any, of said defendant, caused said injury to the plaintiff, and that said negligence, if any, of the defendant was gross, and the negligence of the said plaintiff, or the person driving said buggy, was slight when compared therewith, then the jury are instructed that such slight negligence on the part of the plaintiff, or the person driving said buggy, if you find from the evidence it was slight, will not prevent the plaintiff from recovering in this case." In another instruction the sentence,

§ 48. **Want of ordinary care defeats a recovery.**—The want of ordinary care on the part of the plaintiff could not be construed as “slight negligence” on his part. Speaking of erroneous instructions on this point that had been given, Justice Scholfield of Illinois, in a case in the Supreme Court of that state, said: “The utmost degree of negligence merely—and it is of this only and not of trespass or other wrongs that the instructions speak—of which the defendant can be guilty, is gross negligence. The plaintiff’s negligence, then, by the very terms employed, is ordinary, and that of the defendant gross, in comparison with each other. The language employed, in effect, says, although, as to this particular act, the plaintiff’s intestate was guilty of ordinary negligence, and the defendant guilty of gross negligence, still, if the jury believe the plaintiff’s intestate’s negligence was slight—that is, that it was not what the very terms employed admit it to have been—and that of the defendant gross, in comparison with each other, they will find the defendant guilty. Surely it needs no demonstration that if, as to a particular act, the negligence of the plaintiff was ordinary and that of the defendant gross, their relation is

“If the jury find from the evidence that neither the plaintiff nor the person who was driving the buggy in which he sat was guilty of any negligence which contributed to said injury,” was sufficient to cover the charge that plaintiff must have exercised ordinary care to avoid the injury. *Christin v. Erwin*, 125 Ill. 619; 17 N. E. 707.

An instruction on comparative negligence which omitted to state that the plaintiff must have been in the exercise of due care when injured to avoid the injury was deemed not erroneous if in another instruction that charge is given. *Chicago, etc., R. Co. v.*

*Fetsam*, 123 Ill. 518; 15 N. E. 169; *Chicago, etc., R. Co. v. Johnson*, 116 Ill. 206; 4 N. E. 381; *Chicago, etc., R. Co. v. Ryan*, 70 Ill. 211; S. C. 60 Ill. 172.

An instruction to the jury that if they “believe from the evidence that the plaintiff was wholly without negligence, yet, if you further believe from the evidence that the defendant was guilty of gross negligence, while the plaintiff was guilty of slight negligence, then such slight negligence will not prevent a recovery,” was erroneous, because it assumes that the plaintiff exercised ordinary care. *Toledo, etc., R. Co. v. Cline*, 135 Ill. 41; 25 N. E. 846.

not changed by comparing them with each other. The same evidence that determines the one is gross and the other ordinary, fixes their relative degrees with reference to each other." 53

"Chicago, etc., R. Co. v. Johnson, 103 Ill. 512.

"It seems to be thought what is said in *Stratton v. Central City Horse Ry. Co.* 95 Ill. 25, in criticizing certain instructions there given, sustains the ruling below in regard to these instructions. This is a misapprehension. In those instructions it was said a failure to exercise ordinary care was gross negligence, and in one it was said no action would lie if the plaintiff failed to exercise ordinary care, unless the defendant inflicted the injury. We have before herein shown both these positions to be inaccurate. The failure to exercise ordinary care is only ordinary negligence, and although a plaintiff might not exercise ordinary care, yet the defendant would be liable for injuring him if his act causing injury was so willfully and wantonly reckless as to authorize the presumption of an intention to injure generally, notwithstanding he might have had no special intention to injure the plaintiff." *Chicago, etc., R. Co. v. Johnson*, 103 Ill. 512.

"It must be conceded that the doctrine of comparative negligence has no place in a case where the plaintiff has failed to exercise ordinary care." "The failure to exercise ordinary care is more than slight negligence." *Toledo, etc., R. Co. v. Cline*, 31 Ill. App. 563.

There must have been "no want

of ordinary care on the part of the plaintiff." *Chicago, etc., R. Co. v. Gretzner*, 46 Ill. 74; *Illinois, etc., R. v. Simmons*, 35 Ill. 242; *Western U. T. Co. v. Quinn*, 56 Ill. 319; *Centralia v. Krouse*, 64 Ill. 19; *Chicago, etc., R. Co. v. Gregory*, 58 Ill. 272; *Chicago, etc., Ry. Co. v. Bentz*, 38 Ill. App. 485; *Illinois, etc., R. Co. v. Green*, 81 Ill. 19; *Quincy v. Barker*, 81 Ill. 300; *Toledo, etc., R. Co. v. Cline*, 135 Ill. 41; 25 N. E. Rep. 846.

Plaintiff had the burden to show that the defendant was negligent and that he himself used due care. *Chicago, etc., R. Co. v. Hazzard*, 26 Ill. 373; *Chicago, etc., R. Co. v. Dewey*, 26 Ill. 255; *Chicago, etc., R. Co. v. Gretzner*, 46 Ill. 74; *Chicago, etc., R. Co. v. Simmons*, 38 Ill. 242; *Illinois, etc., R. Co. v. Slatton*, 54 Ill. 133; *Ohio, etc., R. Co. v. Shonefelt*, 47 Ill. 497; *Chicago, etc., R. Co. v. Cass*, 73 Ill. 394; *Kepperly v. Ramsden*, 83 Ill. 354.

If it was not shown that the plaintiff did not use ordinary care, or if it was shown that he did not, then the rule of comparative negligence had no place in the case. *Garfield Mfg. Co. v. McLean*, 18 Ill. App. 447; *Chicago, etc., R. Co. v. Thorson*, 11 Ill. App. 631; *Chicago, etc., R. Co. v. Rogers*, 17 Ill. App. 638; *Chicago, etc., R. Co. v. White*, 26 Ill. App. 586; *Chicago, etc., R. Co. v. Flint*, 22 Ill. App. 502; *Chicago, etc., R. Co. v. Dougherty*, 12 Ill. App. 181; *Union, etc., Co. v. Kollaher*. 12

§ 49. **Failure to exercise ordinary care more than slight negligence.**—"The word 'diligence,' as used in the definitions of the degrees of negligence to which we have referred," said Justice Scholfield of Illinois, "is synonymous with 'care.' This is shown by the text in Story immediately following the definitions quoted.<sup>54</sup> It is there said: 'For he who is only less diligent than very careful men, cannot be said to be more than slightly inattentive; he who omits ordinary care, is a little more negligent than men ordinarily are; and he who omits even slight diligence, falls in the lowest degree of prudence, and is deemed grossly negligent.' It can not, then, be legally true, that where the plaintiff fails to exercise ordinary care, and the defendant is guilty of negligence only, the plaintiff's negligence is slight and that of the defendant gross in comparison with each other."<sup>55</sup>

§ 50. **Ordinary and slight negligence in their popular sense.**—"Giving the words their popular sense, it would rather seem that ordinary negligence would be such negligence as men of common prudence indulge in, which betokens only the exercise of ordinary care, and not the want of ordinary care, as is suggested. This, where the law requires only

Ill. App. 400; Wabash, etc., R. Co. v. Moran, 13 Ill. App. 72; Union, etc., Co. v. Monaghan, 13 Ill. App. 148; Toledo, etc., R. Co. v. Cline, 135 Ill. 41; 25 N. E. Rep. 846.

But the plaintiff did not have to exercise the highest degree of care. Chicago, etc., R. Co. v. Payne, 59 Ill. 534; Terre Haute, etc., R. Co. v. Voelker, 31 Ill. App. 314.

It was error to say to the jury that the plaintiff could not recover unless they "believe from the evidence that the injury complained of was caused by the negligence of the defendant, and the plaintiff was without fault," for

that was stronger than the law justified, being an ignoring of the doctrine of comparative negligence. Ohio, etc., R. Co. v. Porter, 92 Ill. 437.

"The definition of gross negligence itself proves that it is not intended to be the subject of comparison. It is 'the want of slight diligence.' Slight negligence is 'the want of great diligence,' and intermediate, then, is ordinary negligence, which is defined to be 'the want of ordinary diligence.'" Story on Bailments, Sec. 17.

<sup>54</sup> Chicago, etc., R. Co. v. Johnson, 103 Ill. 512.



ordinary care, is not negligence at all, for in law negligence is always faulty. It is the failure in some degree to use that care which the law requires under the circumstances. In a case where the law demands only the use of ordinary care, and ordinary care is actually exercised, there is in law no negligence whatever. In such case it is not true that the want of great diligence is in law slight negligence. In the popular sense of the words, slight negligence is a slight want of the care which the circumstances demand. A man obviously, therefore, may in such case fail slightly to use ordinary care, and in the popular sense of the words he would be guilty of slight negligence, and only slight negligence, and this, although he did not do all that ordinary care required. And so of 'gross negligence.' Its popular meaning is a very great failure to use the care which the law requires. It is not essential to gross negligence that there shall be an utter want of care, or, in the language of Story,<sup>56</sup> 'the want of' even 'slight diligence.' The exercise of slight diligence, where the highest degree of care is by law required, may still leave the party guilty of gross negligence—that is, guilty of a very great failure to exercise the highest care."<sup>57</sup>

**§ 51. Mere preponderance of defendant's negligence not sufficient—Defendant's clearly exceeding plaintiff's negligence.**—The mere fact that the defendant's negligence exceeds that of the plaintiff's will not enable the plaintiff to recover. It is only where his negligence is slight as compared with that of the defendant's. "But he cannot recover unless the negligence of the defendant clearly and largely exceeds his." "Under the instruction given,"<sup>58</sup> although

<sup>56</sup> Story on Bailments, Sec. 17, is referred to.

<sup>57</sup> Justice Dickey, in his dissenting opinion, in *Chicago, etc., R. Co. v. Johnson*, 103 Ill. 512.

<sup>58</sup> "Even though the jury should believe, from the evidence, that the said Horace Clark was, at the

time in question, guilty of some slight negligence either in the management of his team, or in his efforts to escape contact with the engine, still, if they further believe, from the evidence, that the negligence of the railway company, at said time, clearly ex-

there may have been but slight negligence on the part of the company, and some negligence on the part of the deceased, still, if the negligence of the company clearly exceeded that of deceased, although in the smallest degree, plaintiff might recover. Or, under a case where there is gross negligence on the part of both plaintiff and defendant, still, if that of the defendant was clearly, though in the slightest degree, the greater, a recovery could be had under such instruction. This has not been announced by this court as the law, in any case, and to do so would be unreasonable, and work great injustice and wrong. It is not the law, and hence cannot be sanctioned as such. \* \* \* We have no doubt this instruction misled the jury in their finding, and it should not have been given." 59

§ 52. **Gross and slight negligence distinguished.**—In 1882 the Supreme Court undertook to distinguish "gross" and "slight" negligence by instituting a comparison between them. "In holding that the plaintiff may recover," said that court, "in an action for negligence, notwithstanding he has been guilty of contributive negligence, where his negligence is but slight and that of the defendant gross in comparison

ceeded any negligence, if such negligence has been proven, of said Clark, and was the immediate cause of his death, then the jury must find the railway company guilty."

"Chicago, etc., R. Co. v. Clark, 70 Ill. 276; Illinois Cent. R. Co. v. Backus, 55 Ill. 379; Chicago, etc., R. Co. v. Gretzner, 46 Ill. 83; Illinois, etc., R. Co. v. Triplett, 38 Ill. 485.

This instruction was held erroneous: "The court further instructs the jury that if they believe, from the evidence, that Gilbert H. Dimick was killed by the defendant's locomotive engine and

train while he was traveling upon a highway which crossed the defendant's railroad there, although the jury may believe, from the evidence, that the deceased was himself guilty of some negligence which may have, in some degree, contributed to the injury, yet, if the jury further believe, from the evidence, that the negligence of the defendant was of a higher degree, or so much greater than that of the deceased that that of the latter was slight in comparison, the plaintiff is entitled to recover in this action." Chicago, etc., Ry. Co. v. Dimick, 96 Ill. 42.



§ 53. **Plaintiff's negligence must be compared with that of the defendant.**—The quotations made show that the comparison to be instituted must be the negligence of the plaintiff compared with that of the defendant; and not a comparison of the plaintiff's negligence with what an ordinarily prudent and careful man would have done under the particular circumstances; nor can the defendant's conduct be compared with what an ordinarily prudent and careful man would have done under like circumstances. The negligence of plaintiff must be compared with that of the defendant; and that is where the name of "Comparative Negligence" has its origin. If the plaintiff's negligence contributed to the injury, then before he can recover it must appear that his negligence was slight in comparison with that of the defendant's, which must be gross.<sup>61</sup> And an instruction which

ilant solicitude.' In fact, the imperfection of these definitions of Story leads Cooley, in his work on Torts, p. 630, to say of this classification, that it 'only indicates that under the special circumstances great care or caution was required, or only ordinary care, or only slight care,' and to add, 'if the care demanded was not exercised, the case is one of negligence.' The terms 'slight negligence' or 'moderate negligence,' or 'gross negligence,' do not indicate offenses of a different nature, but different degrees in offenses of the same nature. I think, therefore, there may be cases in which it may be legally true that the plaintiff has failed in *some degree* to exercise ordinary care, and that in the same case the defendant has been guilty of gross negligence, wherein the plaintiff's negligence may be slight—that is, may consist of a slight failure to use ordinary care—and that of

the defendant gross in comparison therewith. To my mind the proposition that a plaintiff's negligence is slight, is not compatible with the proposition that he has failed in some degree to use ordinary diligence."

<sup>61</sup> Chicago, etc., R. Co. v. Fiet-sam, 123 Ill. 518; 15 N. E. Rep. 169; Lake Shore, etc., R. Co. v. Johnson, 135 Ill. 641; 26 N. E. Rep. 510; Willard v. Swanson, 126 Ill. 381; 18 N. E. Rep. 548; Village of Jefferson v. Chapman, 127 Ill. 438; 20 N. E. Rep. 33; Jacksonville, etc., R. Co. v. Southworth, 135 Ill. 250; 25 N. E. Rep. 1093; Christian v. Erwin, 125 Ill. 619; 17 N. E. Rep. 707; Chicago, etc., R. Co. v. Johnson, 116 Ill. 206; 4 N. E. Rep. 381; Toledo, etc., R. Co. v. Cline, 135 Ill. 41; 25 N. E. Rep. 846; Chicago, etc., Ry. Co. v. Dunleavy, 129 Ill. 132; 22 N. E. Rep. 15; Chicago, etc., R. Co. v. Longley, 2 Ill. App. 508; City of Winchester v. Case, 5 Ill.

required the jury to find whether the negligence of the plaintiff was slight and that of the defendant was gross, but did not require them to compare the negligence of the respective parties, and determine from such comparison whether one is slight and the other gross, was erroneous.<sup>62</sup> If the plaintiff was guilty of gross negligence, then he could not recover,<sup>63</sup> and it was even said that if he were guilty of negligence contributing to the injury, he could not recover.<sup>64</sup> If both were equally negligent, there could be no recovery.<sup>65</sup> Nor was there any middle ground between slight and gross negligence, the courts refusing to recognize any degrees of negligence. The law of comparative negligence did not authorize the jury to weigh the degrees of negligence and find for the party least in fault.<sup>66</sup> Of the rule one of the ap-

App. 486; *Wabash Ry. Co. v. Jones*, 5 Ill. App. 607; *North Chicago, etc., R. Co. v. Monka*, 4 Ill. App. 604; *Illinois Central R. Co. v. Brookshire*, 3 Ill. App. 225; *Chicago, etc., R. Co. v. Krueger*, 124 Ill. 457; 17 N. E. Rep. 52; affirming 23 Ill. App. 639; *Chicago, v. Stearns*, 105 Ill. 554; *Chicago, etc., R. Co. v. Fears*, 53 Ill. 115; *Illinois, etc., R. Co. v. Slatton*, 54 Ill. 133.

<sup>62</sup> *Chicago, etc., R. Co. v. Dillon*, 17 Ill. App. 355; *Moody v. Peterson*, 11 Ill. App. 180; *Pittsburg, etc., Ry. Co. v. Shannon*, 11 Ill. App. 222; *Union Ry., etc., Co. v. Kollaher*, 12 Ill. App. 400; *Chicago, etc., R. Co. v. O'Connor*, 13 Ill. App. 62.

<sup>63</sup> *Chicago, etc., R. Co. v. Lee*, 68 Ill. 576.

<sup>64</sup> *Chicago, etc., R. Co. v. Fears*, 53 Ill. 115; *Illinois, etc., R. Co. v. Slatton*, 54 Ill. 133. But this is qualified in a later case. *Chicago, etc., R. Co. v. Krueger*, 23 Ill. App. 639; 124 Ill. 457; 17 N. E. Rep. 52.

<sup>65</sup> *Illinois Cent. R. Co. v. Backus*, 55 Ill. 379; *Indianapolis, etc., R. Co. v. Stables*, 62 Ill. 313; *Chicago, etc., R. Co. v. Murray*, 62 Ill. 326; *Ohio, etc., R. Co. v. Eaves*, 42 Ill. 288; *Chicago, etc., R. Co. v. Lee*, 68 Ill. 576.

"If both parties are equally in fault, or nearly so, the rule is the same." *Chicago, etc., R. Co. v. Van Patten*, 64 Ill. 510.

<sup>66</sup> *Wabash Ry. Co. v. Jones*, 5 Ill. App. 606; *North Chicago, etc., Co. v. Monka*, 4 Ill. App. 604; *Chicago, etc., R. Co. v. Van Patten*, 64 Ill. 510.

"It never was the law in this state that the negligence of the parties to a controversy upon that object would be weighed in a scale, where, if it inclined at all in favor of the plaintiff, he might recover against the defendant. Nor, it is believed, has such a rule ever been established by a court of recognized authority, that if the negligence of the plaintiff in a case of this kind [a defective town bridge] is a shade less than

pellate courts of the state said: "The rule of comparative negligence requires and has always required much more than a mere preponderance of negligence on the part of the defendant to authorize a recovery. When the plaintiff is chargeabl with contributory negligence, though slight, there must be a wide disparity between his negligence and that of the defendant before he can recover."<sup>67</sup> Gross negligence on the part of the defendant did not excuse the plaintiff from the use of ordinary care.<sup>68</sup> The burden was on the plaintiff to not only show that the defendant's negligent conduct caused the injury, but he had also the burden to show that he was free from negligence or else that his own negligence was slight in comparison with that of the defendant.<sup>69</sup> In

that of the defendant, he may be allowed to recover." *Provident, etc., v. Carter*, 2 Ill. App. 34.

"The doctrine of comparative negligence is founded upon a comparison of the negligence of the plaintiff's with that of the defendant's. This element of comparison is of the very essence of the rule. It must not only appear that the negligence of the plaintiff is slight and that of the defendant gross, but also that they are so when compared with each other." *Moody v. Peterson*, 11 Ill. App. 180.

This instruction has been held to be correct: "If they find, from the evidence, that the plaintiff was guilty of some negligence, but that the defendant was guilty of gross negligence contributing to such injury, and that the plaintiff's negligence was slight as compared with the negligence of the defendant, still she may be entitled to recover." *City of Chicago v. Stearns*, 105 Ill. 554.

See generally on the subject of this section, *Chicago, etc., R. Co.*

*v. Triplett*, 38 Ill. 482; *Illinois, etc., R. Co. v. Hetherington*, 83 Ill. 510; *Chicago, etc., R. Co. v. Lee*, 68 Ill. 576; *Terre Haute, etc., R. Co. v. Voelker*, 31 Ill. App. 314; *Chicago, etc., R. Co. v. Dewey*, 26 Ill. 255; *Galena, etc., R. Co. v. Jacobs*, 20 Ill. 478; *Chicago, etc., R. Co. v. Hogarth*, 38 Ill. 370.

The capacity of plaintiff had to be considered in determining the degree of his negligence. *Kerr v. Forque*, 54 Ill. 482.

"*Parmelee v. Farro*, 22 Ill. 407; *Peoria, etc., Ry. Co. v. Miller*, 11 Ill. App. 375; *Springfield, etc., Ry. Co. v. DeCamp*, 11 Ill. App. 475.

"*Toledo, etc., R. Co. v. Cline*, 135 Ill. 41; 25 N. E. Rep. 846; *Chicago, etc., Ry. Co. v. Dunleavy*, 129 Ill. 132; 22 N. E. Rep. 15.

"*Chicago, etc., R. Co. v. Hazard*, 26 Ill. 373; *Chicago, etc., R. Co. v. Dewey*, 26 Ill. 255; *Chicago, etc., R. Co. v. Gretzner*, 46 Ill. 74; *Chicago, etc., R. Co. v. Simmons*, 38 Ill. 242; *Illinois, etc., R. Co. v. Slatton*, 54 Ill. 133; *Ohio, etc., R. Co. v. Shonefelt*, 47 Ill. 497; *Chi-*

view of these distinctions and requirements, one of the appellate courts was justified in its use of the following statement concerning negligence as administered in the courts of Illinois: "The doctrine of comparative negligence, as applied to cases where the injury is not willful, seems to be shorn of all practical meaning. A plaintiff can in no case recover unless he has used ordinary care, no matter how gross the negligence of the defendant, while if he used ordinary care, his whole duty has been performed, and a comparison of his conduct with that of the defendant as to the question of negligence would seem useless."<sup>70</sup>

**§ 54. Plaintiff's negligence compared with defendant's.**—Slight negligence on the part of the plaintiff, in comparison with that of the defendant's, did not defeat the plaintiff in his cause of action. In determining whether or not the negligence of the plaintiff had been slight, that of the defendant had first to be ascertained, and then the comparison be made. It is readily seen that the same negligence of the plaintiff

cago, etc., R. Co. v. Cass, 73 Ill. 394; Kepperly v. Ramsden, 83 Ill. 354.

<sup>70</sup> Illinois Central R. Co. v. Trowbridge, 31 Ill. App. 190.

Referring to an instance where the deceased's negligence had been slight and that of the defendant reckless, the Supreme Court said of such deceased's conduct. "His carelessness may have been induced by the presumption that those persons [defendant's employes] would do their duty." Chicago, etc., R. Co. v. Triplett, 38 Ill. 482; Illinois, etc., R. Co. v. Hetherington, 83 Ill. 510.

"Gross negligence is the want of slight care." Chicago, etc., R. Co. v. Johnson, 103 Ill. 512.

Where a passenger on a railroad car permitted his arm to rest on

the base of the car window, and slightly project outside, and thereby had his arm broken in passing a freight train on an adjoining track, his negligence was held slight as compared with that of the railroad company in permitting its freight cars to stand so near the track of its passenger train, and he could recover for his injuries. Chicago, etc., R. Co. v. Pondrom, 51 Ill. 333.

Slight negligence is not slight want of ordinary care, but merely want of extraordinary care, and did not prevent a recovery. Griffin v. Willow, 43 Wis. 509; Dreher v. Fitchburg, 22 Wis. 675; Ward v. Milwaukee, etc., Ry. Co. 29 Wis. 144; Hammond v. Mukwa, 40 Wis. 35.

in one instance might be slight negligence, while in another it would be more than slight, and defeat him. "Although the plaintiff may be guilty of some degree of negligence, yet if it is but slight as compared with that of the defendant, the plaintiff shall be allowed to recover."<sup>71</sup> "This rule applies even where the slight negligence of the plaintiff in some degree contributed to the injury."<sup>72</sup> In a subsequent case, in reviewing the doctrine as announced in Jacob's case,<sup>73</sup> it was said: "That the question of liability did not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care or want of care as manifested by both parties, for all care or negligence is, at best, but relative, the absence of the highest possible degree of care, showing the presence of some negligence, slight as it may be. The true doctrine, therefore, this court thought was, that in proportion to the negligence of the defendant should be measured the degree of care required of the plaintiff. The degrees of negligence must be measured and considered, and whenever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, the plaintiff shall not be deprived of his action."<sup>74</sup>

<sup>71</sup> *Coursen v. Ely*, 37 Ill. 338.

<sup>72</sup> *Coursen v. Ely*, 37 Ill. 338.

<sup>73</sup> *Galena, etc., R. Co. v. Jacobs*, 20 Ill. 478.

<sup>74</sup> *Chicago, etc., R. Co. v. Sweeney*, 52 Ill. 325.

"No inflexible rule can be laid down. Each case must depend upon its own circumstances." *Chicago, etc., R. Co. v. Sweeney*, 52 Ill. 325; *Chicago, etc., R. Co. v. Triplett*, 38 Ill. 482; *Chicago, etc., R. Co. v. Gretzner*, 46 Ill. 74; *Coursen v. Ely*, 37 Ill. 338; *Chicago, etc., R. Co. v. Hogarth*, 38 Ill. 370; *Illinois Central R. R. Co. v. Simmons*, 38 Ill. 242; *St. Louis, etc., R. Co. v. Todd*, 36 Ill. 409; *Chicago, etc., R. Co. v. Pondrom*,

51 Ill. 333; *Illinois Cent. R. Co. v. Backus*, 55 Ill. 379; *Chicago, etc., R. Co. v. Dignan*, 56 Ill. 487; *Chicago, etc., R. Co. v. Gravy*, 58 Ill. 83; *Chicago, etc., R. Co. v. Dunn*, 61 Ill. 384; *Indianapolis, etc., R. Co. v. Stables*, 62 Ill. 313; *Chicago, etc., R. Co. v. Still*, 19 Ill. 499; *Illinois, etc., R. Co. v. Middlesworth*, 43 Ill. 64; *St. Louis, etc., R. Co. v. Manly*, 58 Ill. 300; *Toledo, etc., Ry. Co. v. Spencer*, 66 Ill. 528; *Illinois Cent. R. Co. v. Maffit*, 67 Ill. 431; *Chicago, etc., R. Co. v. Payne*, 59 Ill. 534; *Chicago, etc., R. Co. v. Van Patten*, 64 Ill. 510; *Peoria Bridge, etc., v. Loomie*, 20 Ill. 236; *Ohio, etc., R. Co. v. Shonefelt*, 47 Ill.



**§ 55. Willful injury by defendant—Slight negligence of plaintiff.**—"The rule of this court is, that negligence is relative, and that a plaintiff, although guilty of negligence which may have contributed to the injury, may hold the defendant liable, if he has been guilty of a higher degree of negligence, amounting to willful injury. The fact that a plaintiff is guilty of a slight negligence, does not absolve the defendant from the use of care and all reasonable efforts to avoid the injury. The negligence of the plaintiff does not license the defendant to wantonly or willfully destroy the plaintiff's property. Each party must be held to the use of all reasonable efforts to avoid the injury, and the negligence of one party does not absolve the other from diligence and caution." <sup>75</sup>

**§ 56. Mere preponderance of negligence against defendant not sufficient.**—Mere preponderance of negligence on the part of the defendant over that of the plaintiff's will not authorize the plaintiff to recover; and to say to the jury that the plaintiff may recover if the plaintiff's negligence was less than that of the defendant is error, for that authorizes a recovery even if the defendant's negligence merely preponderated over that of the plaintiff. For the plaintiff can recover only where his negligence was slight in comparison with that of the defendant's negligence.<sup>76</sup>

497; Chicago, etc., R. Co. v. Murray, 62 Ill. 326; Pittsburg, etc., R. Co. v. Knutson, 69 Ill. 103; Rockford, etc., R. Co. v. Hillmer, 72 Ill. 235; Chicago, etc., R. Co. v. Mock, 72 Ill. 141; Keokuk Packet Co. v. Henry, 50 Ill. 264; Illinois Cent. R. Co. v. Cragin, 71 Ill. 177; Toledo, etc., Ry. Co. v. McGinnis, 71 Ill. 346; Chicago, etc., R. Co. v. Cass, 73 Ill. 394; Chicago, etc., R. Co. v. Donahue, 75 Ill. 106; Toledo, etc., Ry. Co. v. O'Connor, 77 Ill. 391; Kewanee v. Depew, 80 Ill. 119; Schmidt v.

Chicago, etc., R. Co. 83 Ill. 405.

<sup>75</sup> St. Louis, etc., R. Co. v. Todd, 36 Ill. 409; Peoria, etc., R. Co. v. Champ, 75 Ill. 577.

<sup>76</sup> Chicago, etc., R. Co. v. Dunn, 61 Ill. 385; Indianapolis, etc., R. Co. v. Stables, 62 Ill. 313; Illinois Cent. R. Co. v. Moffit, 67 Ill. 431; Chicago, etc., R. Co. v. Van Pat-ten, 64 Ill. 510; Chicago, etc., R. Co. v. Lee, 68 Ill. 576; Chicago, etc., R. Co. v. Lee, 60 Ill. 501; Chicago, etc., R. Co. v. Mock, 72 Ill. 141.

§ 57. **Jury must compare the negligence of the defendant with that of the plaintiff.**—It is for the jury to determine whether the plaintiff's negligence was slight in comparison with that of the defendant, or whether it was equal or greater. They must compare the degrees of negligence. And it was proper to instruct the jury that if the plaintiff had been guilty of unreasonable negligence, and the defendant guilty of gross negligence, they should find for the latter.<sup>77</sup> And an instruction limiting a recovery to the negligence of the defendant and freedom of the plaintiff from negligence materially contributing to the injury, was erroneous; for it kept out of view the rule of comparative negligence.<sup>78</sup> "The gross negligence of the defendant is as indispensable an element as the slight negligence of the deceased; and it appearing from the evidence that there is contributive negligence on the part of the plaintiff or the deceased, it is for the jury to determine, from all the evidence, the relative degrees of the negligence of the parties, and unless they be satisfied that of the plaintiff or deceased is slight and that of the defendant gross in comparison with each other, there can be no recovery. The onus, in establishing the relative degrees of negligence, is not thrown on the defendant."<sup>79</sup> Neither party, in the first instance, is assumed to have been negligent. The negligence must be proved, and unless it appears from the proof that the plaintiff's care, under all the evidence, is proved as alleged, there can be no recovery."<sup>80</sup>

§ 58. **Instructions must require comparison.**—Care had to be used instructing the jury that the defendant's negli-

<sup>77</sup> Illinois Central R. Co. v. Mid-dlesworth, 43 Ill. 64. Chicago, etc., R. Co. v. Payne, 59 Ill. 534; Chicago, etc., R. Co. v. Lee, 60 Ill. 501; Illinois Central R. Co. v. Cragin, 71 Ill. 177; Schmidt v. Chicago, etc., R. Co. 83 Ill. 405.

<sup>78</sup> Schmidt v. Chicago, etc., R. Co. 83 Ill. 405; Illinois, etc., R. Co. v. Hetherington, 83 Ill. 510.

<sup>79</sup> City of Indianapolis, etc., R. Co. v. Evans, 88 Ill. 63.

<sup>80</sup> Chicago, etc., R. Co. v. Harwood, 90 Ill. 425; Chicago, etc., R. Co. v. Dimick, 96 Ill. 42; Chicago, etc., R. Co. v. Triplett, 38 Ill. 482; City of Chicago v. Stearns, 105 Ill. 554.

gence must be "gross" in order to enable the plaintiff to recover whether his negligence was slight. "The jury must be told, to authorize a recovery, it must appear, from the evidence, that the negligence of the plaintiff is slight and that of the defendant's gross, in comparison with each other, and it will not be sufficient simply to say the plaintiff may recover, though negligent, provided his negligence is slight in comparison with that of the defendant."<sup>81</sup>

**§ 59. Illustration—Engine striking hand car—Unlawful speed.**—A case of collision of a hand car and an engine, illustrates somewhat the rule of comparative negligence. The collision took place in a city, and at the time the engine was running at a speed prohibited by an ordinance, and no bell was rung or whistle sounded. The laborer was on the hand car, which those in charge of it had been in the habit of bringing into the city at the hour of the accident. The approach of the engine was concealed from the view of those on the hand car on account of a curve, and trees and buildings. It was held that the negligence of the railroad company was gross, and that of the deceased, if any, was slight.<sup>82</sup>

**§ 60. Illustration—Mail crane striking fireman.**—A fireman on a railroad locomotive while passing a station in the night time was killed by coming in contact with a mail

<sup>81</sup> Chicago, etc., R. Co. v. Harwood, 90 Ill. 425; Illinois Cent. R. Co. v. Hammer, 72 Ill. 351; Union, etc., Co. v. Monaghan, 13 Ill. App. 148; Christian v. Erwin, 22 Ill. App. 534.

An instruction which required the jury to find whether the negligence of the plaintiff was slight and that of the defendant gross, but did not require them to compare the negligence of the respective parties, and determine from such comparison whether the one was slight and the other gross,

was erroneous. Chicago, etc., R. Co. v. Dillon, 17 Ill. App. 355; Moody v. Peterson, 11 Ill. App. 180; Pittsburg, etc., Ry. Co. v. Shannon, 11 Ill. App. 222; Union, etc., Ry. Co. v. Kollerher, 12 Ill. App. 400; Chicago, etc., R. Co. v. O'Connor, 13 Ill. App. 62. As to practice in Illinois in giving instructions concerning comparative negligence, see Chicago, etc., Ry. Co. v. Dimick, 96 Ill. 42.

<sup>82</sup> Toledo, etc., R. Co. v. O'Connor, 77 Ill. 391.

crane or catcher near the main track. He was looking out for signals when struck. Two other accidents had previously occurred from the same cause, both of which the company had notice. It was held that the company was guilty of gross negligence; and there might be a recovery even if the fireman had been guilty of negligence in leaning out from the sideway while looking for signals, his negligence in that regard being slight in comparison with that of the company.<sup>83</sup>

§ 61. **Admiralty suits—Apportionment of damages.**—The strict rules of the common law do not apply to suits in admiralty to recover damages for injuries inflicted. Admiralty courts have always refused to be bound by the rules of that law with respect to contributory negligence. Where both parties have been guilty of negligence, the damages are apportioned between them, usually divided equally, so that the plaintiff or defendant will recover only one-half the amount of damages he has suffered.<sup>84</sup> While the general rule is to give the

<sup>83</sup> Chicago, etc., R. Co. v. Gregory, 58 Ill. 272.

<sup>84</sup> The Schooner Catharine, 17 How. 170; 15 L. Ed. 233; Petersfield v. The Judith, Abbott on Shipping, 231; The Celt, 3 Hagg. 328π; The Washington, 5 Jurist, 1067; The Fiends, 4 E. F. Moore, 314, 322; The Seringapatam, 5 N. of C. 61, 66; Vaux v. Salvador, 4 Ad. & El. 431; The Monarch, 1 Wm. Rob. 21; The Dr. Cock, 5 Mon. L. Mag. 303; The Oratava, 5 Mon. L. Mag. 45, 362; Atlee v. Packet Co. 21 Wall. 389; 22 L. Ed. 619, reversing 2 Dill, 479; Fed. Cas. No. 10341; The City of Carlisle, 39 Fed. Rep. 807; The City of Alexandria, 17 Fed. Rep. 390; Anderson v. The Ashbrooke, 44 Fed. Rep. 124; The Serapis, 49 Fed. Rep. 393; The Wanderer, 51 Fed. Rep. 140; The Explorer, 21

Fed. Rep. 135; The Max Morris, 24 Fed. Rep. 860 (affirmed, 28 Fed. Rep. 881); The Daylesford, 30 Fed. Rep. 633; The Joseph Stickney, 31 Fed. Rep. 156; the Lackawanna, 151 Fed. Rep. 499; The Max Morris, 137 U. S. 1; 11 Sup. Ct. Rep. 29; Rogers v. Steamer St. Charles, 19 How. 108; 15 L. Ed. 563; Chamberlain v. Ward, 21 How. 548; 16 L. Ed. 211; affirming Fed. Cas. No. 17,151; The Washington, 9 Wall. 513; 19 L. Ed. 787; The Sapphire, 11 Wall. 164; 20 L. Ed. 127; The Ariadne, 13 Wall. 475; 20 L. Ed. 542; reversing 7 Blatchf. 211; Fed. Cas. No. 525; The Continental, 14 Wall. 345; 20 L. Ed. 801; reversing 8 Blatchf. 33; Fed. Cas. No. 3,141; The Teutonia, 23 Wall. 77; 23 L. Ed. 44; The Sunnyside, 91 U. S. 208; 23 L. Ed.

plaintiff only half his damages when he contributed to the injury, yet the rule is not an inflexible one as to the amount, and only a third has been allowed, interpreting the rule for a division according to the respective fault of the parties.<sup>85</sup> Even gross fault does not change the general rule.<sup>86</sup> This rule has been applied to cases of personal injury of seamen after an exhaustible examination of the question.<sup>87</sup>

302; reversing *Brown*, Ad. Cas. 227; Fed. Cas. No. 13,620; *The America*, 92 U. S. 432; *The Juniata*, 93 U. S. 337; 23 L. Ed. 930; *The Stephen Morgan*, 94 U. S. 599; 23 L. Ed. 930; *The Virginia Ehrman*, 97 U. S. 309; 24 L. Ed. 890; *The City of Hartford*, 97 U. S. 323; 24 L. Ed. 930; 11 Blatchf. 72; Fed. Cas. No. 2,752; *The Civita*, 103 U. S. 699; 26 L. Ed. 599; 6 Ben. 309; Fed. Cas. No. 2,775; *The Connecticut*, 103 U. S. 710; 26 L. Ed. 467; *The North Star*, 100 U. S. 17; 1 Sup. Ct. Rep. 41; affirming 8 Blatchf. 209; Fed. Cas. No. 10,331; *The Sterling*, 106 U. S. 647; 1 Sup. Ct. Rep. 89; 27 L. Ed. 98; *The Manitoba*, 122 U. S. 97; 7 Sup. Ct. Rep. 1158; 90 L. Ed. 1095; *The Columbia*, 27 Fed. Rep. 238; *The James D. Leacy*, 110 Fed. Rep. 685 (affirmed, 113 Fed. Rep. 1019; 51 C. C. A. 620); *The Providence*, 98 Fed. Rep. 133; 38 C. C. A. 670; *The New York*, 175 U. S. 187; 20 Sup. Ct. Rep. 67; 44 L. Ed. 126, reversing 27 C. C. A. 154; 54 U. S. App. 248; 82 Fed. Rep. 819; *Steam Dredge No. 1*, 134 Fed. Rep. 161; 67 C. C. A. 67; 69 L. R. A. 293 (denying the applicability of the doctrine of *Davies v. Mann*, 10 Mes. & Wils. 546); *The William Murtagh*, 17 Fed. Rep. 259; *The Bordentown*, 16 Fed. Rep. 270; *The Jeremiah Godfrey*, 17 Fed. Rep. 738; *The Monticello*, 15

Fed. Rep. 474; *The B. & C.*, 18 Fed. Rep. 543; *The M. J. Cummings*, 18 Fed. Rep. 178; *The Syracuse*, 18 Fed. Rep. 828; *Memphis, etc., Co. v. Yager, etc., Co.* 10 Fed. Rep. 395; *Mason v. Steam Tug*, 3 Fed. Rep. 404; *The William Cox*, 9 Fed. Rep. 672; *Connolly v. Ross*, 11 Fed. Rep. 342; *The David Dowe*, 16 Fed. Rep. 154; *Christian v. Van Tassel*, 12 Fed. Rep. 884, 890; *The Explorer*, 20 Fed. Rep. 140; *The E. B. Ward*, 20 Fed. Rep. 702; *The Mabel Comeaux*, 24 Fed. Rep. 490; *The Mystic*, 44 Fed. Rep. 399; *The Frank and Willie*, 45 Fed. Rep. 405; *The Nathan Hale*, 48 Fed. Rep. 700; *The Julia Fowler*, 49 Fed. Rep. 279; *The Serapis*, 49 Fed. Rep. 396; *The J. & J. McCarthy*, 55 Fed. Rep. 86; *The Cyprus*, 55 Fed. Rep. 333; *Wm. Johnson & Co. v. Johnson*, 86 Fed. Rep. 888; *The Lackawanna*, 151 Fed. Rep. 499.

<sup>85</sup>*The Mary Ida*, 20 Fed. Rep. 741.

<sup>86</sup>*The Pegasus*, 19 Fed. Rep. 46; *The Maria Martin*, 12 Wall. 31; 20 L. Ed. 251; affirming 2 Biss. 41; Fed. Cas. No. 9,079.

<sup>87</sup>*Olson v. Flavel*, 34 Fed. Rep. 477 (distinguishing *The Clarendon*, 6 Sawy. 544; 4 Fed. Rep. 649, and *Holmes v. Railway Co.* 6 Sawy. 262; 5 Fed. Rep. 523); *The Max Morris*, 137 U. S. 1; 11 Sup. Ct. Rep. 29; 34 L. Ed. 586;

§ 62. **Origin of admiralty rule.**—"The rule of admiralty in collisions," said Judge Wallace, "apportioning the loss in case of mutual fault, is peculiar to the maritime law. It is not derived from the civil law, which agrees with the common law in not allowing a party to recover for the negligence of another where his own fault has contributed to the

affirming 24 Fed. Rep. 860, and 28 Fed. Rep. 881. See *The Daylesford*, 30 Fed. Rep. 633; *The Joseph Stickney*, 31 Fed. Rep. 156.

"We think the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides in navigation." *Schooner Catharine v. Dickinson*, 17 How. 170; 15 L. Ed. 233; *The Mary Patten*, 2 Low. 196.

"As the *Saxe* thus contributed to the collision, I must hold her also in fault, and order the damages to be divided, and a decree will be entered accordingly." *The Ant*, 3 Fed. Rep. 294. See *Vessel Owners' Towing Co. v. Wilson*, 63 Fed. Rep. 630; 24 U. S. App. 49; *The Edward Luckenbach*, 94 Fed. Rep. 545; *Beiden v. Chase*, 150 U. S. 691; 14 Sup. Ct. Rep. 269; 37 L. Ed. 1218, reversing 117 N. Y. 637; 22 N. E. Rep. 963; *The Victory*, 68 Fed. Rep. 400; 25 U. S. App. 271.

Senator Piles: "The rule of admiralty is this, as it has been decided by the Supreme Court of the United States: That if an injury occurs on board ship, or one which has relation to the courts of admiralty, the court divides the damages between the ship and the person who received the injury. It is not necessary that the master should have seen the accident; that he should have

stood there, or that any one representing the master of the ship was present. If the hold of the ship is left open, and a seaman on board that ship, through his own negligence, in the absence of the master, carelessly passes along the deck and falls into an unlighted hold or hatchway, he can recover damages against the ship in an action *in rem* for whatever he may be entitled to, deducting therefrom, as the court will, the amount the court thinks should be deducted by reason of his own negligence. In other words, the court will find in an admiralty case, under the circumstances I have stated, and altogether in the absence of the master, the amount of damages the complainant or libellant is entitled to. If it be \$10,000, and the court finds that one-half of that was the result of the libellant's own negligence, and the other half was the result of the negligence of the ship, the master or mate, then, on account of his own contributory negligence in the case, the court would deduct \$5,000 from the amount which the libellant otherwise would be entitled to recover. It does not necessitate the presence of any one on board the ship representing the ship, directing him to go into it to entitle him to recover." 60 Cong. Record, 1st Sess., p. 4536.

injury. It emanated from the ancient maritime codes and the reasons which are assigned by commentators as commending it are various and divergent. According to Clieroe,<sup>88</sup> 'this rule of division is a rustic sort of determination, and such as arbiters and amicable compromisers of dispute commonly follow where they cannot discover the motives of the parties, or where they see fault on both sides.' He thought its object was to prevent owners of old and worthless ships from getting them run down on purpose, in order to found a claim for excessive damage. Mr. Bell defends the rule upon expediency, 'because,' he says, 'there appears to be no sufficient protection, without some such rule, for weak ships against stronger and larger ships, the masters and crews of which will undoubtedly be more careless when they know that there is little risk of detection and none at all of direct damage to their vessel, by which a smaller ship may be run down without any injury to the assailant.' Lord Denman<sup>89</sup> says, 'It grows out of an arbitrary provision in the law of nations, from views of general expediency, not as dictated from natural justice, nor, possibly, quite consistent with it.' By the laws of most of the maritime states the rule was applied indiscriminately in collisions where both vessels were to blame, where neither was to blame, and when the blame could not be detected. In a recent article in the *Law Quarterly Review*,<sup>90</sup> Mr. Mersden traces the history of the recognition of the general maritime law on this subject by the English admiralty courts, and shows that in the earlier cases the rule of division of loss was applied where there was no fault in either ship, and when the cause of collision was uncertain, as well as in cases where both ships were in fault. Since *The Woodrop Sims* case<sup>91</sup> the rule has only been applied in the case of both ships in fault; and, as thus applied, is now adopted as a part of the general municipal law of England by the *Judicature Act of 1873*.<sup>92</sup>

<sup>88</sup> 1 Bell, Comm. (5th Ed.) 581.

<sup>89</sup> 2 Dods, 83.

<sup>90</sup> In *Devaux v. Salvador*, 4 Adal. & El. 420.

<sup>91</sup> *The Max Morris*, 24 Fed. Rep. 860; affirmed, 28 Fed. Rep. 881; and affirmed on appeal to the Su-

<sup>92</sup> July, 1886, Vol. 2, p. 362.

§ 63. **Rule in admiralty commended.**—This rule of the admiralty court has been commended by the Supreme Court of the United States in the following language: "But the plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceedings is in many respects different, and the rules of decisions are different. The mode of pleading is different, the proceedings more summary and informal, and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating the damages. In the common law court the defendant must pay all the damages or none. If there has been, on the part of the plaintiff, such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or, in other words, where both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in securing practical justice, as the other; and the plaintiff, who has the selection of the forum in which he will litigate, cannot complain of the rule of that forum. It is not intended to say that the principles which determine the existence of mutual fault, on which the damages are divided in admiralty, are precisely the same as those which establish contributory negligence at law that would defeat the action. Each court has its own set of rules for deter-

preme Court, 137 U. S. 1; 11 Sup. Ct. 29; 34 L. Ed. 586; affirming 28 Fed. Rep. 881; *The Wanderer*, 21 Fed. Rep. 140; *The Explorer*, 21 Fed. Rep. 135. The Statute of England referred to is Sub-div. 9, Sec. 25, Chap. 66 of 36 and 37 Vict. (L. R. 8, Stat. 321), and is as follows: "(9) In any

cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rule in force in the Courts of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail."



mining these questions, which may be in some respects the same, but in others vary materially." 23

**§ 64. Difficulty of apportioning damages.**—In an early Kansas case Justice Brewer refers to the difficulty of apportioning the damages between the parties where both are guilty of negligence contributing to the injury. "Logically," says he, "the wrongdoer should always compensate, and the wrong and the injury always entitle to relief. When the wrong of both parties contributes to the injury, the law declines to apportion the damages, and so leaves the injured party without any compensation. This is not strictly justice. The wrongdoer causing the injury ought not to be released from making any compensation, simply because the injured

"Atlee v. Packet Co. 21 Wall. 389; 22 L. Ed. 619, reversing 2 Dill. 479; Fed. Cas. No. 10,341.

"In cases of marine torts, courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law;" and "they have exercised a conscientious discretion upon the subject." Justice Story in *The Marianna Flora*, 11 Wheat. 1; 6 L. Ed. 405; affirming 3 Mason, 116; Fed. Cas. No. 9,080.

"The moiety rule in collision cases was adopted," said Justice Bradley, "for the better distribution of justice among mutual wrongdoers." *The Alabama*, 92 U. S. 695; 23 L. Ed. 763; reversing 11 Blatchf. 482; Fed. Cas. No. 123.

"Under the circumstances attending these disasters, in case of mutual fault, we think the rule dividing the loss the most just and equitable, and as best tending

to induce care and vigilance on both sides in navigation." *The Catharine*, 17 How. 170; 15 L. Ed. 233.

"The more equal distribution of justice, the dictates of humanity, the safety of life and limb, and the public good will, I think, be clearly best promoted by holding vessels liable to bear some part of the actual pecuniary loss, where their fault is clear, provided that the libellant's fault, though evident, is neither willful nor gross, nor inexcusable, and where the other circumstances present a strong case for his relief. Such a rule will certainly not diminish the care of laborers for their own safety, while it will surely tend to quicken the attention of the owners and masters of vessels towards providing all needful means for the safety of life and limb." *The Max Morris*, 24 Fed. Rep. 861; affirmed 137 U. S. 1; 11 Sup. Ct. Rep. 29; 35 L. Ed. 586; *The Scandinavia*, 156 Fed. Rep. 403.

party is also a wrongdoer, and helped to produce the injury. But many considerations, especially the difficulty of apportioning the damages and determining to what extent the wrong of the respective parties was instrumental in causing the injury, uphold the rule so universally recognized, that where the wrong, the negligence of both parties, contributes to the injury, the law will not afford relief."<sup>94</sup>

§ 65. **Assumption of risk.**—If the servant has assumed the risk in the performance of the act wherein he was injured, and the defendant is not otherwise negligent, then such servant cannot recover; and the doctrine of comparative negligence, or a division of damages in admiralty cases, has no place in the case.<sup>95</sup>

§ 66. **Contributory negligence does not prevent a recovery—How damages are apportioned.**—By examination of the cases cited in the foregoing sections it will be perceived that while the Georgia and Illinois cases are analogous, they are not strictly in point regarding the recovery of damages under the federal statutes where the plaintiff has been guilty of contributory negligence; for that statute lays down a rule that is broader and more liberal than those announced by either of these state courts or than is laid down by the several sections of the Georgia code when construed together. The federal statute allows a recovery in all cases where the plaintiff has been guilty of negligence and the defendant has likewise been guilty, both of their negligent acts joining and producing the injury. When that fact is ascertained, then the sole question is the proportion of the amount of damages he has suffered that the plaintiff is entitled to recover. It

<sup>94</sup> *Kansas Pacific Ry. Co. v. Pointer*, 14 Kan. 37.

<sup>95</sup> *The Scandinavia*, 156 Fed. Rep. 403; *The Saratoga*, 94 Fed. Rep. 221; 36 C. C. A. 208, reversing 87 Fed. Rep. 349; *The*

*Serapis*, 51 Fed. Rep. 92, 266; reversing 49 Fed. Rep. 393; *The Maharajah*, 40 Fed. Rep. 784; *The Henry B. Fiske*, 141 Fed. Rep. 188; *The Carl*, 18 Fed. Rep. 655.

is not a question of slight and gross negligence, as it was in Illinois; it is not a question of where the plaintiff's negligence began in order to constitute it contributory negligence, as in Georgia. The rule in admiralty approaches nearer the rule of this statute than of any of the decisions of the states; for there the damages are apportioned according to the respective faults of the two parties. Under the federal statute it becomes the duty of the court, if it is trying the case, or the jury if that is the method of trial, according to the Illinois rule, to compare the negligence of the plaintiff with that of the defendant, in order to determine the quantum of damages he is entitled to recover; and the comparison cannot be made with some standard outside the case. Of course, if the defendant has not been guilty of negligence, there can be no recovery; and that question must always be the most vital and the controlling one in the case. The assumption of the risk is another question to be considered. Neither of these two rules (except the failure to comply with the provision of the statute concerning safe appliances) have been either abrogated or in any wise changed. If the plaintiff's negligence was as great as that of the defendant, he recovers one-half of his damages. So he may recover if his negligence was greater than that of the defendant. But if he was not guilty of any negligence contributing to his injuries, then he recovers full damages; and in determining whether he was guilty of contributory negligence the entire facts, as disclosed by the evidence, must be considered. The court must apportion the damages, according to the relative amount of the negligence of the parties, or the jury must do likewise if it tries the case. Necessarily the court can lay down for the guidance of the jury only a general rule upon the subject. "For the apportionment of damages according to the relative fault of the parties," said the Supreme Court of Georgia, "there seems to be no standard more definite than the enlightened opinion of the jury."<sup>96</sup>

<sup>96</sup> Georgia, etc., Co. v. Neely, 56 Ga. 580.

Some light may be gleaned from some Tennessee cases. See

**§ 66a. Negligence of plaintiff necessary to concur with defendants to produce the injury.**—An interesting question is this: "Suppose the negligence of the plaintiff was necessary so that it might concur with that of the defendant's negligence in order to occasion the injury; can the plaintiff recover?" It would seem that the statute is broad enough to justify a recovery by the plaintiff of his damages. It is true that the plaintiff must have been guilty of negligence, else the injury would not have been occasioned; but it is also true that the defendant must have been guilty of negligence in order to occasion the injury. Plaintiff's negligence, therefore, was nothing more than contributory negligence of a grave character; and is such negligence as does not prevent a recovery on his part for some of his damages.

**§ 67. Court cannot lay down exact rules for apportionment of damages.**—It is clear that courts cannot lay down rigid rules for the apportionment of the damages in a particular case. This is a fact that must be left to the jury, practically without directions. The remarks of Justice Cooley upon negligence in general throw some light upon

Nashville, etc., R. Co. v. Carroll, 6 Heisk. 347; Duch v. Fitzhugh, 21 Lea (Tenn.) 307; Hill v. Nashville, etc., R. Co. 9 Heisk. 823; Smith v. Nashville, etc., R. Co. 6 Heisk. 174; Railroad Co. v. Walker, 11 Heisk. 383; Jackson v. Nashville, etc., R. Co. 13 Lea, 491; 49 Am. Rep. 663; Nashville etc., R. Co. v. Wheles, 10 Lea, 471; 43 Am. Rep. 317; Whirley v. Whiteman, 1 Head, 610.

Erroneous notions that comparative negligence obtained in Kentucky has prevailed; but they are unfounded. See article of Helm Bruce, Esq., in Kentucky Law Journal for April, 1882, and Kentucky, etc., R. Co. v. Thomas, 79 Ky. 160; 42 Am. Rep. 208.

It remains to see whether the courts will accept the provisions of the section quoted at the beginning of this chapter in the spirit in which they were enacted. It is to be feared they will not. "The reason why, in case of mutual, concurring negligence, neither party can maintain an action against the other," said Justice Strong, of Pennsylvania, "is not that the wrong of the one is set off against the wrong of the other; it is, that the law cannot measure how much the damages suffered is attributable to the plaintiff's own fault." Heil v. Glanding, 42 Pa. St. 499.

the subject: "Negligence, as I understand it," says he, "consists in a want of that reasonable care which would be exercised by a person of ordinary prudence, under all the existing circumstances, in view of the probable danger of injury. The danger is, therefore, one which must take into consideration all these circumstances, and it must measure the prudence of the parties' conduct by a standard of behavior likely to have been adopted by other persons of common prudence. Moreover, if the danger depends at all upon the action of any other person under a given set of circumstances, the prudence of the party injured must be estimated in view of what he had a right to expect from such other person, and he is not to be considered blamable if the injury has resulted from the action of another which he could not reasonably have anticipated. Thus the problem is complicated by the necessity of taking into account the two sets of circumstances affecting the conduct of different persons; it is only to be satisfactorily solved by the jury placing themselves in the position of the injured person and examining those circumstances as they then presented themselves to him, and from that standpoint judging whether he was guilty of negligence or not. It is evident that such a problem cannot usually be one upon which the law can pronounce a definite sentence, and that it must be left to the sifting and determinaion of a jury."<sup>97</sup>

"Detroit, etc., R. Co. v. Van Steinburg, 17 Mich. 99, 118. See Briggs v. Taylor, 28 Vt. 183; North Pennsylvania R. Co. v. Heileman, 49 Pa. St. 60; Bolton v. Frink, 51 Conn. 342; 50 Am. Rep. 24; Isbell v. New York, etc., R. Co. 27 Conn. 393; Meesel v. Lynn, etc., R. Co. 8 Allen, 234; Ireland v. Oswego, etc., R. Co. 13 N. Y. 533; Railroad Co. v. Stout, 17 Wall. 657; 21 L. Ed. 746; affirming 2 Dill. 294; Fed. Cas. No. 13,504.

"The court could not say that one course or the other was the

more prudent, nor that the adoption of the more hazardous was, under all the circumstances, as a matter of law, contributory negligence." Hawkins v. Johnston, 105 Ind. 29; 4 N. E. Rep. 172; Brazil, etc., Co. v. Hoodlet, 129 Ind. 327; 27 N. E. Rep. 741; Cleveland, etc., Ry. Co. v. Patterson, 37 Ind. App. 617; 78 N. E. Rep. 681; Stephens v. American, etc., Co. 38 Ind. App. 414; 78 N. E. Rep. 335; Columbus, etc., Co. v. Burke, 37 Ind. App. 518; 77 N. E. Rep. 409.

§ 68. **Directing the verdict—Due care.**—The statute introduces new rules concerning the directing of the verdict. Even the rule prevailing in Georgia cannot be followed; for as we have seen this federal statute is not complicated with what are in a measure antagonistic clauses in different sections. It does not require of the plaintiff the exercise of due care; and if he did not use due care, that fault of his only goes to the reduction of his damages. There are many instances in which courts have laid down rules applicable to them in which it has been held that the plaintiff had been guilty of contributory negligence and so could not recover. In such cases verdicts have been directed. But the sole question there before the court was, "Had the plaintiff been guilty of contributory negligence?" within the rules adopted by the courts in the specific instance; and if his case fell within one of those rules, he must suffer a defeat, and the court could either enter a non-suit or direct a verdict. But these instances are no longer applicable; for the court cannot weigh the respective negligence of the parties. That is a question for the jury, and it is the jury's sole province to determine. If, however, the evidence clearly shows that the defendant was not guilty of negligence, then, of course, the court may direct the verdict for him, in which event there would be no damages to assess.

§ 69. **Court telling jury particular acts constitute contributory negligence.**—But because the court cannot direct the verdict, it does not follow that the court cannot inform the jury that the facts proven show the plaintiff had been guilty of contributory negligence, where the facts and inferences to be drawn from them are not conflicting as to the fact that contributory negligence existed, or where courts, by reason of a long line of like repeated facts coming before them have adopted rules that as to the conduct of the plaintiff in such instances the courts will say, as a matter of law, that the plaintiff, in law, had contributed to his own injuries and could not recover. Where the court, how-

ever, has said this to the jury—not that the plaintiff could not recover, but that he had been guilty of contributory negligence—it can go no further; for then it becomes the duty of the jury to weigh and determine the relative faults of the party and award or withhold damages accordingly.

**§ 70. Rules of contributory negligence must be considered.**—The well known rule concerning what is and what is not contributory negligence must be considered, and the law applicable thereto constantly be borne in mind. They cannot be ignored. The statute in no way modifies them, except in the proviso when the defendant has violated a statute “enacted for the safety of employe.” If the injury was inflicted by the failure of the defendant to comply with such a statute, then he cannot be held to have been guilty of contributory negligence.

**§ 71. Injury occasioned by defendant having violated a safety device statute.**—The section quoted at the beginning of this chapter expressly provides, “That no employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.” A subsequent section of this statute provides that the employe cannot be held to have assumed the risk where he is injured or killed by the violation by the defendant of any statute enacted for the safety of employes contributive to such injury or death.

**§ 72. Presenting the defense of contributory negligence—Burden.**—This Federal statute has not changed the rule with reference to the presentation of contributory negligence as a defense, except it is now only a partial defense. In the federal courts the burden of presenting contributory negligence of the plaintiff as a defense has always been upon

the defendant,<sup>88</sup> and this burden still continues in a suit brought under this statute. But where the action is brought in the state court then the practice peculiar to that state need not necessarily prevail, unless the burden to show contributory negligence, before the enactment of this statute, has prevailed; for, while the plaintiff must prove the extent of his injuries and practically the amount of his damages, or furnish a basis from which the jury (or court if trying the case without a jury) can estimate or compute such amount, it does not follow that he must first prove that amount and then show to what extent they have been lessened by his own contributory negligence. Therefore, when he has proven his injury and its extent and other attendant facts, thus showing a basis from which the jury can estimate his damages, if the defendant desires to reduce them by showing plaintiff's contributory negligence he has the burden to do so. It necessarily results that if the action is brought in a state court, the burden is upon the defendant to show plaintiff's contributory negligence, if he desires to reduce what the amount of the damages would otherwise be; and that the rule of a state practice casting a burden upon the plaintiff to show his freedom from fault before he can recover, has

<sup>88</sup> *Railroad Co. v. Gladmon*, 15 Wall. 401; 21 L. Ed. 114; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291; 23 L. Ed. 898; *Hough v. Railway Co.* 100 U. S. 213; 25 L. Ed. 612, reversing Fed. Cas. No. 6,221; *Crew v. St. Louis, etc., R. Co.* 20 Fed. Rep. 87; *Hull v. Richmond*, 2 Woodb. & M. 337; *Dunmead v. American, etc., Co.* 4 McCrary, 244; *Dillon v. Union Pacific R. Co.* 3 Dill. 325; *Morgan v. Bridge Co.* 5 Dill. 96; *Secord v. St. Paul, etc., R. Co.* 5 McCrary, 515; *Wabash, etc., R. Co. v. Century Trust Co.* 32 Alb. L. Jr. 96.

Suppose the contributory act of the employee caused the employer

damages, for instance, injured several other persons who recover damages from the employer. Can the latter, when sued by his employee, by counter claim (in those states allowing a counter claim in actions to recover damages occasioned by negligence) reduce the damages or defeat his action by setting up the damages his contributory negligence has occasioned? It is thought not; because the statute does not give the employer a cause of action where his act contributed to the injury, which would be the case if the counter claim be sustained.



necessarily been changed and does not apply when the action is based upon the Federal Employers' Liability Act.

**§72a. When contributory negligence does not diminish damages.** The proviso to section three provides that if the injury or death of the employe was occasioned by the violation by the common carrier of any statute enacted for the safety of employes, or rather if the violation contributed to it, the employe shall not "be held to have been guilty of contributory negligence" in such case. When such a case is presented the factor of the employer's contributory negligence is not to be considered in order to reduce his damages. The statute absolutely prohibits it. But, of course, the violation of the statute must have been the proximate cause of the injury, else the employee would not be guilty of negligence at all; and if the employee's act was the proximate cause of the injury, irrespective of the violation of the statute, then he cannot recover; because the employer has been guilty of no actionable negligence. So, in instances of a violation of a (Federal) statute, resulting in an injury to the employe, where section four provides it shall not be considered that the employe assumed the risk, the damages cannot be diminished by reason of his negligence contributing to the result. But in all such instances the violation of the statute must have caused or produced the injury—must have been the proximate cause of it.

## CHAPTER V.

### DEATH BY WRONGFUL ACT.

#### SECTION.

- 73. Statute.
- 74. No action at common law.
- 75. Constitutionality of statute allowing recovery for beneficiaries.
- 76. Deceased without right of recovery.
- 77. Failure of deceased to bring action.
- 78. Instantaneous death.
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#### SECTION.

- 87. Beneficiary must survive deceased—Complaint.
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- 96. Costs.
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- 98. Death of beneficiary.
- 99. Distribution of amount recovered.
- 99a. Right of widow to sue under state statute.

§ 73. **Statute.**—The statute provides that a common carrier by railroad while engaging in certain commerce, "shall be liable in damages to any person suffering injury while he is employed in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carriers," etc. Under the statute only the

administrator (and perhaps the executor) can bring the suit.<sup>1</sup> The general administrator may bring the action, a special one is not necessary.<sup>2</sup>

§ 74. **No action at common law.**—The maxim *actio personalis moritur cum persona* applied to actions at common law for the death of a person; and this is true whether the death was instantaneous or not as a result of the injury.<sup>3</sup> Therefore, if a right to recover exists, it must be given by a statute.<sup>4</sup> A statute giving a right of action in force at the place of the injury applies to a suit in admiralty.<sup>5</sup>

§ 75. **Constitutionality of statute allowing recovery for beneficiaries.**—It is no longer an open question that a stat-

<sup>1</sup> Cleveland, etc., R. Co. v. Osborn, 36 Ind. App. 34; 73 N. E. Rep. 285; Dillier v. Cleveland, etc., R. Co. 34 Ind. App. 52; 72 N. E. Rep. 271; Lake Erie, etc., R. Co. v. Charmer, 161 Ind. 95; 67 N. E. Rep. 623; Cleveland, etc., R. Co. v. Osgood, 36 Ind. App. 34; 73 N. E. Rep. 285.

<sup>2</sup> Lake Erie, etc., R. Co. v. Charmer, *supra*; Cleveland, etc., R. Co. v. Osgood, *supra*.

<sup>3</sup> Higgins v. Yelverton, Yelv. 89; Baker v. Bolton, 1 Campb. 493; Osborn v. Gillett, L. R. 8 Exch. 88; 42 L. J. Exch. 53; 28 L. T. (N. S.) 197; 21 W. R. 409; Carey v. Berkshire R. Co. 1 Cush. 475; Eclen v. Lexington, etc., R. Co. 14 B. Mon. 165; Hyatt v. Adams, 16 Mich. 180; Grosso v. Delaware, etc., R. Co. 50 N. J. L. 317; 13 Atl. Rep. 233; Lyons v. Woodward, 49 Me. 29; Wyatt v. Williams, 43 N. H. 102; Kramer v. Market St. Ry. Co. 25 Cal. 434; Little Rock, etc., Ry. Co. v. Barker, 33 Ark. 350; Edgar v. Costello, 14 S. C. 20; Natchez, etc.,

R. Co. v. Cook, 63 Miss. 38; Scheffler v. Minneapolis, etc., R. Co. 32 Minn. 125; 19 N. W. Rep. 656; Sherman v. Johnson, 58 Vt. 40; 2 Atl. Rep. 707; Thomas v. Union Pac. Ry. Co. 1 Utah, 132; Sullivan v. Union Pac. Ry. Co. 2 Fed. Rep. 447; 1 McCrary, 301; Whitford v. Panama R. Co. 23 N. Y. 465; Hubgh v. New Orleans, etc., R. Co. 6 La. Ann. 495; Herman v. New Orleans, etc., R. Co. 11 La. Ann. 5; Connecticut, etc., Co. v. New York, etc., R. Co. 25 Conn. 265; Insurance Co. v. Brame, 95 U. S. 754; 24 L. Ed. 580; The Harrisburg, 119 U. S. 199; 7 Sup. Ct. Rep. 140; 30 L. Ed. 358; reversing 15 Fed. Rep. 610; *In re La Burgogne*, 117 Fed. Rep. 261.

<sup>4</sup> Louisville, etc., R. Co. v. Jones, 45 Fla. 407; 34 So. Rep. 246; Peers v. Nevada, etc., Co. 119 Fed. Rep. 400.

<sup>5</sup> Lindstrom v. International, etc., Co. 117 Fed. Rep. 170; The Northern Queen, 117 Fed. Rep. 906.

ute allowing a recovery for the benefit of those dependent upon the deceased is constitutional. The validity of such a statute has been firmly established.<sup>6</sup> This is true although the statute only applies to railroad companies.<sup>7</sup> Once the cause of action has accrued in favor of a beneficiary, a subsequent statute cannot change the beneficiary,<sup>8</sup> or repeal the right to the action.<sup>9</sup>

§ 76. **Deceased without right to recover.**—The beneficiaries only receive their right to recover damages through the right of the deceased to recover damages if he had brought the suit. If he could not successfully maintain an action for his injuries, his administrator cannot maintain one successfully for their benefit.<sup>10</sup>

§ 77. **Failure of deceased to bring action.**—The failure of the deceased to bring suit for his injuries, though he had ample time to do so, is no defense.<sup>11</sup>

§ 78. **Instantaneous death.**—The statute expressly provides for an action in favor of the beneficiaries in case of

<sup>6</sup> *Boston, etc., R. Co. v. State*, 32 N. H. 215; *Louisville, etc., R. Co. v. Louisville, etc., Co. (Ky.)* 17 S. W. Rep. 567; *Carroll v. Missouri Pac. Ry. Co.* 88 Mo. 239; *Sherlock v. Alling*, 93 U. S. 99; 23 L. Ed. 819; affirming 44 Ind. 184; *Southwestern, etc., R. Co. v. Paulk*, 24 Ga. 536; *Bond v. Seerace*, 2 Duv. 576.

<sup>7</sup> *Boston, etc., R. Co. v. State*, *supra*.

<sup>8</sup> *Chicago, etc., R. Co. v. Pounds*, 11 Lea (Tenn.) 130.

<sup>9</sup> *Denver, etc., R. Co. v. Woodward*, 4 Colo. 162; *Lundin v. Kansas Pac. Ry. Co.* 4 Colo. 433.

<sup>10</sup> *Evansville, etc., R. Co. v. Lowdermilk*, 15 Ind. 120; *Ohio, etc., R. Co. v. Tindall*, 13 Ind. 386;

*Hecht v. Ohio, etc., R. Co.* 132 Ind. 507; 32 N. E. Rep. 302; *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442; 8 N. E. Rep. 18; 9 N. E. Rep. 357; *Pittsburg, etc., R. Co. v. Hosea*, 152 Ind. 412; 53 N. E. Rep. 419; *Kaufman v. Cleveland, etc., R. Co.* 144 Ind. 456; 43 N. E. Rep. 446; *Pennsylvania, etc., R. Co. v. Meyers*, 136 Ind. 242; 36 N. E. Rep. 32; *Madison, etc., R. Co. v. Bacon*, 6 Ind. 205; *Neilson v. Brown*, 13 R. I. 651; *Martin v. Wallace*, 40 Ga. 52; *Wallace v. Connor*, 38 Ga. 199; *Pym v. Great, etc., Ry. Co.* 2 B. & S. 759.

<sup>11</sup> *Malott v. Shimer*, 153 Ind. 35; 54 N. E. Rep. 101.

death of the injured persons; and this applies to an instantaneous death.<sup>12</sup>

§ 79. **Beneficiaries on death of injured employee.**—In an instance of the death of the injured employee his personal representative brings the action for the benefit of those surviving him and they are entitled to the proceeds of any judgment that may be recovered in the following order, viz:

*First*—The surviving widow or husband and children of such employee.

*Second*—If there be no husband, widow or children, then for the benefit of the employee's parents.

*Third*—If there be no beneficiaries under the first and second class, then for the benefit of the next of kin dependent upon such employee.

If there be persons of the first class, all the persons of the second and third class are excluded; if there be none of the first and be those of the second class, all those of the third class are excluded; and it is only where there are none of the first and second classes that those of the third class can be considered as beneficiaries.<sup>13</sup>

<sup>12</sup> *Brown v. Buffalo, etc., R. Co.* 22 N. Y. 191; *Reed v. Northeastern R. Co.* 37 S. C. 42; 16 U. E. Rep. 289; *Roach v. Imperial Mining Co.* 7 Fed. Rep. 698; 7. *Sawyer*. 224; *International, etc., R. Co. v. Kindred*, 57 Tex. 491; *Murphy v. New York, etc., R. Co.* 30 Conn. 184; *Connors v. Burlington, etc., R. Co.* 71 Iowa, 490; 32 N. W. Rep. 465; *Worden v. Humeston, etc., etc., R. Co.* 72 Iowa, 201; 33 N. W. Rep. 629; *Nashville, etc., R. Co. v. Prince*, 2 Heisk. (Tenn.) 580; *Fowler v. Nash*, 5 Baxt. (Tenn.) 663; *Haley v. Mobile, etc., R. Co.* 7 Baxt. (Tenn.) 239; *Kansas City, etc., R. Co. v. Daugherty*, 88 Tenn. 721; 13 S. W. Rep. 698; *Van Am-*

*burg v. Vicksburg, etc., R. Co.* 37 La. Ann. 651; *Hamilton v. Morgan, etc., R. Co.* 42 La. Ann. 824; 8 So. Rep. 586.

<sup>13</sup> *Dillier v. Cleveland, etc., R. Co.* 34 Ind. App. 52; 72 N. E. Rep. 271.

Suppose the deceased employee left no surviving widow, no children, no parent and no next of kin depending upon him; and a state statute gives a cause of action where a person, in such an instance is killed by the negligence of another. Can the administrator of the deceased maintain an action under this state statute? If the act is to be construed as exclusive, then the action cannot be brought; if not

§ 80. **No husband or widow surviving.**—It will be noted that the statute provides in the first class that the suit shall be brought “for the benefit of the surviving widow or husband and children of such employe,” and the question naturally arises, “Suppose, where the deceased employe is a husband and father and no widow survives him, can the suit be maintained for the benefit of his children alone? Must there be a surviving widow in such an instance, in order to authorize the bringing of the suit?” These questions have been answered by some of the state courts in construing similar statutes, and held that though there be no widow surviving the deceased, but children survive, the action can be maintained.<sup>14</sup>

§ 81. **Next of kin dependent upon employe.**—If there be no widow or husband and children or parent of the deceased employe, then “the next of kin dependent upon” him are entitled to the proceeds of the action, these falling in the third group of beneficiaries. But the fact that the next of kin are non-resident aliens does not defeat the action.<sup>15</sup> Partial dependency is sufficient to authorize the maintenance

as exclusive, then it can be. Congress has failed to give a right of action for the benefit of creditors, and if the act is to be construed as exclusive, then none can be maintained by an administrator.

Steps towards a divorce, but not procured, still leaves the wife a beneficiary. *Abel v. Northampton, etc.*, Co. 212 Pa. St. 329; 61 Atl. Rep. 915.

<sup>14</sup> *City of Chicago v. Major*, 18 Ill. 349; *Haggerty v. Central R. Co.* 31 N. J. L. 349; *McMahon v. City of New York*, 33 N. Y. 642; *Quin v. Moore*, 15 N. Y. 432; *Oldfield v. New York, etc.*, R. Co. 14 N. Y. 310; *Tilley v. Hudson R. Co.* 24 N. Y. 471.

<sup>15</sup> *Rietveld v. Wabash R. Co.* 129 Ia. 249; 105 N. W. Rep. 515; *Pittsburg, etc.*, R. Co. v. *Naylor*, 73 Ohio St. 115; 76 N. E. Rep. 505; *Baltimore, etc.*, R. Co. v. *Baldwin*, 144 Fed. Rep. 53; *Alfson v. Bush Co.* 182 N. Y. 393; 75 N. E. Rep. 230; *Atchison, etc.*, R. Co. v. *Fajardo*, 74 Kan. 314; 86 Pac. Rep. 301; *Tano v. Municipal, etc.*, Co. 84 N. Y. Stat. 1053; 88 App. Div. 251; *Naylor v. Pittsburg, etc.*, R. Co. 4 Ohio C. C. (N. S.) 437 (*contra*, *Cleveland, etc.*, R. Co. v. *Osgood*, 36 Ind. App. 34; 70 N. E. Rep. 839); *Hirschkovitz v. Pennsylvania R. Co.* 138 Fed. Rep. 438.

of the suit.<sup>16</sup> But in the case of a widow, husband, child or parent no question of dependency is involved.<sup>17</sup>

§ 82. **Who are dependent on deceased.**—In the previous section it is said that a partial dependency on the deceased was all that was necessary. Who is dependent is, of course, a question of fact. An invalid sister who has received each month thirty or thirty-five dollars, is unable to pay her doctor bills or to work, and is, in fact, dependent upon her deceased brother, comes within the statute.<sup>18</sup> An indigent mother living with her unmarried son and depending upon him for support, is dependent upon him within the meaning of a statute similar to the one under discussion.<sup>19</sup> Where an aged father lived in a foreign country, was feeble, destitute, unable to work, and the deceased had many times sent him money, it was held that he was dependent on the deceased son.<sup>20</sup> But where it appeared that the alleged beneficiary was a half sister with two children, that the deceased came to see her at times and then usually gave her money, and sent her money every other week or so for her rent, and she had no other means of support, and since his death had supported herself, it was held that she was not dependent upon him, there being nothing to show the amount of her earnings or that she was, in fact, dependent upon him.<sup>21</sup> The question of dependency does not depend upon a strict legal right to it, as where a person because of some disability, and without property, was dependent on the deceased for support, and because of past support he had reasonable expectancy of the continuation if the deceased had lived.<sup>22</sup> And the fact that

<sup>16</sup> Savannah El. Co. v. Bell, 124 Ga. 663; 53 S. E. 109; Louisville, etc., R. Co. v. Jones (Fla.), 39 So. Rep. 485.

<sup>17</sup> Beaumont, etc., Co. v. Dillworth, 16 Tex. Civ. App. 257; 94 S. W. Rep. 352.

<sup>18</sup> Daly v. New Jersey, etc., R. Co. 155 Mass. 1; 29 N. E. Rep. 507.

<sup>19</sup> Bowerman v. Lackawanna,

etc., Co. (Mo. App.) 71 S. W. Rep. 1062.

<sup>20</sup> Boyle v. Columbia, etc., Co. 182 Mass. 93; 64 N. E. Rep. 726.

<sup>21</sup> Hodnett v. Boston, etc., R. Co. 156 Mass. 86; 30 N. E. Rep. 224.

<sup>22</sup> Louisville, etc., R. Co. v. Jones, 45 Fla. 407; 34 So. Rep. 246; United States, etc., Co. v. Sullivan, 22 App. Dec. 115.

the deceased had paid attentions to a young lady with a view to marriage does not even tend to show his parents were not dependent on him for support.<sup>23</sup> Where two brothers and a nephew, with whom deceased lived and did housework they were held entitled to recover, though there was no legal obligation on her part to support them.<sup>24</sup> The fact that the beneficiary is a married woman will not defeat her right of action where she does not live with her husband, is not supported by him but was, in fact, dependent on the deceased.<sup>25</sup> And the fact that the beneficiary is supported by others after the death of the deceased does not prevent a recovery.<sup>26</sup> The fact of dependency must be established by the plaintiff<sup>27</sup> for there can be no recovery unless that be shown.<sup>28</sup>

§ 83. **Bastard.**—A suit for the benefit of a bastard where its reputed father has been killed cannot be maintained; for he is not of "kin" to the reputed father.<sup>29</sup> And it has been held that the mother of an illegitimate child cannot recover for its death,<sup>30</sup> though it is believed that this is an incorrect decision, and the contrary has been held.<sup>31</sup>

<sup>23</sup> *Futz v. Western U. T. Co.* 25 Utah, 263; 71 Pac. Rep. 209.

<sup>24</sup> *Smith v. Michigan, etc., R. Co.* 35 Ind. App. 188; 73 N. E. Rep. 928.

<sup>25</sup> *International, etc., R. Co. v. Boykin* (Tex. Civ. App.), 85 S. W. Rep. 1163.

<sup>26</sup> *McDaniels v. Royle, etc., Co.* 110 Mo. App. 706; 85 S. W. Rep. 679.

<sup>27</sup> *Willis, etc., Co. v. Grizzell*, 198 Ill. 313; 85 N. E. Rep. 74; *Missouri, etc., R. Co. v. Freeman* (Tex. Civ. App.), 73 S. W. Rep. 542.

<sup>28</sup> *Swift & Co. v. Johnson*, 138 Fed. Rep. 867; *Diller v. Cleveland, etc., R. Co.* 34 Ind. App. 52; 72 N. E. Rep. 271.

<sup>29</sup> *McDonald v. Pittsburg, etc., R. Co.* 144 Ind. 459; 43 N. E. Rep. 447; *Thornburgh v. American, etc., Co.* 141 Ind. 443; 40 N. E. Rep. 1062; *Dickinson v. Northeastern R. Co.* 2 H. & C. 735; 33 L. J. Exch. 91; 9 L. T. (N. S.) 299; 12 W. R. 52; *Good v. Towns*, 56 Vt. 410.

<sup>30</sup> *Harkins v. Philadelphia*, 15 Phila. 286. See *Marshall v. Washash R. Co.* 46 Fed. Rep. 269; *Robinson v. Georgia R., etc., Co.* 117 Ga. 168; 43 S. E. Rep. 452; *Runt v. Illinois, etc., R. Co.* 88 Miss. 575; 41 So. Rep. 1; *McDonald v. Southern R. Co.* 71 S. C. 352; 51 S. E. Rep. 138.

<sup>31</sup> *Muhl v. Southern M. R. Co.* 10 Ohio St. 272.



§ 84. **Emancipated child.**—The fact that the child of the deceased father has been emancipated is no defense.<sup>82</sup> Nor is it a bar to the action that the child was not living with the father at his death,<sup>83</sup> or its custody awarded to the divorced wife.<sup>84</sup>

§ 85. **Adopted child.**—It has been held that an adopting father could sue for the death of his adopted child,<sup>85</sup> and it would seem that suit could be brought for the death of the adopting father where such adopted child was the sole beneficiary. Yet it has been held that such a child is not "next of kin."<sup>86</sup> But a child that had been merely given to the deceased cannot be treated as a beneficiary, not being of kin.<sup>87</sup>

§ 86. **Posthumous child.**—The action may be brought for the benefit of a child *en ventre sa mere* at the time of its father's death.<sup>88</sup> Such a child is a "surviving child."<sup>89</sup>

§ 87. **Beneficiaries must survive deceased—Complaint.**—If there be no person alive designated as a beneficiary by the statute, then no action can be maintained. The survival of

<sup>82</sup> *Mattock v. Williamsville, etc.*, R. Co. (Mo.) 95 S. W. Rep. 849.

<sup>83</sup> *Gulla v. Lehigh, etc., Co.* 28 Pa. Super. Ct. 11.

<sup>84</sup> *Taylor v. San Antonio, etc.*, Co. 15 Tex. Civ. App. 344; 93 S. W. Rep. 674.

<sup>85</sup> *Thornburgh v. American, etc.*, Co. 141 Ind. 443; 40 N. E. Rep. 1062.

<sup>86</sup> *Heidcamp v. Jersey City, etc.*, R. Co. 69 N. J. L. 284; 55 Atl. Rep. 239.

<sup>87</sup> *Elwood St. Ry. Co. v. Cooper*, 22 Ind. App. 459; 53 N. E. Rep. 1092; *Elwood St. Ry. Co. v. Ross*, 26 Ind. App. 258; 58 N. E. Rep. 535.

<sup>88</sup> *State v. Soale*, 36 Ind. App. 73; 74 N. E. Rep. 1111 (sale of intoxicating liquors to the father, resulting in his death); *Quinlen v. Welch*, 69 Hun, 584; 23 N. Y. Supp. 963; *Thelluson v. Woodford*, 4 Ves. 227; 11 Ves. 112.

<sup>89</sup> *Nelson v. Galveston, etc.*, Ry. Co. 78 Tex. 621; 14 S. W. Rep. 1021; Texas, etc., Ry. Co. v. Robertson (Tex.), 17 S. W. Rep. 1041; *The George and Richard, L. R. Ad. & Ecc.* 466; 24 L. T. (N. S.) 717; 20 Weekly Rep. 245; *Galveston, etc., R. Co. v. Contreras*, 31 Tex. Civ. App. 489; 73 S. W. Rep. 1051.

a beneficiary is essential to the maintenance of the cause of action.<sup>40</sup> It is, therefore, essential for the administrator to show that a person survived the deceased employe who was then a beneficiary; and if he do not, his complaint or declaration will be insufficient;<sup>41</sup> and if it do not contain an allegation of that fact, the judgment will be subject to a motion to arrest it.<sup>42</sup>

§ 88. **Statute of limitations.**—The action must be brought within two years after the death of the injured person,<sup>43</sup>

✓ <sup>40</sup> *Koenig v. City of Covington* (Ky.), 17 S. W. Rep. 128; *Cincinnati, etc., R. Co. v. Pratt*, 92 Ky. 233; 17 S. W. Rep. 484; *Kentucky, etc., R. Co. v. McGinty*, 12 Ky. L. Rep. 482; 14 S. W. Rep. 601; *Louisville, etc., R. Co. v. Coppage* (Ky.), 13 S. W. Rep. 1086; *Kentucky, etc., R. Co. v. Wainwright* (Ky.), 13 S. W. Rep. 438; *Cincinnati, etc., R. Co. v. Adam* (Ky.), 13 S. W. Rep. 428; *Louisville, etc., R. Co. v. Merriweather* (Ky.), 12 S. W. Rep. 935; *Conley v. Cincinnati, etc., R. Co.* (Ky.) 12 S. W. Rep. 784; *Henning v. Louisville, etc., Co.* (Ky.) 12 S. W. Rep. 550; *Wiltsie v. Town of Linden*, 77 Wis. 152; 46 N. W. Rep. 234; *Woodward v. Chicago, etc., R. Co.* 23 Wis. 400; ✓ *Serensen v. Northern Pac. Ry. Co.* 45 Fed. Rep. 407; *Lilly v. Charlotte, etc., R. Co.* 32 S. C. 142; 10 S. E. 932; *Warren v. Englehart*, 13 Neb. 283; 13 N. W. Rep. 401; *Conlin v. City of Charleston*, 15 Rich. L. 201; *Burlington, etc., R. Co. v. Crockett*, 17 Neb. 570; — 14 N. W. Rep. 219.

✓ <sup>41</sup> *Stewart v. Terre Haute, etc., R. Co.* 103 Ind. 44; 2 S. E. Rep. 208; *Chicago, etc., R. Co. v. La Porte*, 33 Ind. App. 691; 71 N. E. Rep. 166; *Lamphear v. Buckingham*, 33 Conn. 237; *Indianapolis,*

*etc., R. Co. v. Keely*, 23 Ind. 133; *Jeffersonville, etc., R. Co. v. Hendricks*, 41 Ind. 48; *Chicago, etc., R. Co. v. Morris*, 26 Ill. 400; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Conant v. Griffin*, 48 Ill. 410; *Clore v. McIntire*, 120 Ind. 262; 22 N. E. Rep. 128; *Missouri Pac. Ry. Co. v. Barber*, 44 Kan. 612; 24 Pac. Rep. 969; *Safford v. Drew*, 3 Duer. 627; *Geroux v. Graves*, 62 Vt. 280; 19 Atl. Rep. 987; *Lucas v. New York, etc., R. Co.* 21 Barb. 245; *Northern Pac. R. Co. v. Ellison*, 3 Wash. 225; 23 Pac. Rep. 233; *Westcott v. Central Vt. R. Co.* 61 Vt. 638; 17 Atl. Rep. 745; *Schwarz v. Judd*, 28 Minn. 371; 10 N. W. Rep. 208; *East Tennessee, etc., Ry. Co. v. Lilly*, 90 Tenn. 563; 18 S. W. Rep. 118; *Barnum v. Chicago, etc., R. Co.* 30 Minn. 461; 16 N. W. Rep. 364.

✓ <sup>42</sup> *Stewart v. Terre Haute*, 103 Ind. 44; 2 N. E. Rep. 208.

✓ <sup>43</sup> *Goodwin v. Bodean, etc., Co.* 109 La. 1050; 34 So. Rep. 74; *County v. Pacific, etc., Co.* 68 N. J. L. 273; 53 Atl. Rep. 386; *Staunton Coal Co. v. Fischer*, 119 Ill. App. 284; *Dare v. Wabash, etc., R. Co.* 119 Ill. App. 256; *Crape v. Syracuse*, 183 N. Y. 395; 76 N. E. Rep. 465.

and the time is not extended by the pendency and dismissal of a former action as allowed by some codes in the ordinary cases.<sup>44</sup> The statute requiring the action to be brought within two years is not, strictly speaking, a statute of limitations, which must be specially pleaded, but is an absolute bar, not removable by any of the ordinary exceptions of that statute.<sup>45</sup> "This is not strictly a statute of limitations," said the Supreme Court of North Carolina. "It gives a right of action that would not otherwise exist. \* \* \* It must be accepted in all respects as the statute gives it. Why the action was not brought within the time does not appear, but any explanation in that respect would be unavailing, as there is no saving clause as to the time within which the action must be begun."<sup>46</sup> "The time within which the suit must be brought," said Chief Justice Waite, "operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all." "The liability and the remedy [in admiralty] are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."<sup>47</sup> It follows from those statements that if the complaint shows the action was not brought within the two years, it is demurrable.<sup>47\*</sup> No exception can be alleged to excuse the delay.<sup>48</sup> The statute provides that the action must be "commenced within two years from the

<sup>44</sup> *Rodman v. Missouri Pac. Ry.* Co. 65 Kan. 645; 70 Pac. Rep. 642; 59 L. R. A. 704; *Cavanagh v. Ocean, etc.*, Co. 13 N. Y. Supp. 540; 9 N. Y. Supp. 198; 11 N. Y. Supp. 547; 12 N. Y. Supp. 609; *Boyd v. Clerk*, 8 Fed. Rep. 849.

<sup>45</sup> *Hill v. New Haven*, 37 Vt. 501; *Landigan v. New York, etc.*, R. Co. 5 Civ. Proc. Rep. (N. Y.) 76; *Bonnell v. Jowett*, 24 Hun, 524.

<sup>46</sup> *Taylor v. Cranberry, etc.*, Co. 94 N. C. 525; *Best v. Town of*

*Kingston*, 106 N. C. 205; 10 S. E. Rep. 997.

<sup>47</sup> *The Harrisburg*, 119 U. S. 199; 7 Sup. Ct. Rep. 199; 30 L. Ed. 358; reversing 15 Fed. Rep. 610.

<sup>47\*</sup> *Hanna v. Jeffersonville R. Co.* 32 Ind. 113; *Jeffersonville, etc.*, R. Co. v. *Hendricks*, 41 Ind. 48; *George v. Chicago, etc.*, R. Co. 51 Wis. 603; 8 N. W. Rep. 374.

<sup>48</sup> *Hill v. New Haven*, 37 Vt. 501.

day the cause of action accrued." Where the employe is instantly killed, the cause of action accrues at once and the statute immediately begins to run.<sup>49</sup> In some states it has been held that the statute does not begin to run until an administrator has been appointed;<sup>50</sup> but directly the opposite has also been held.<sup>51</sup> An amendment of the complaint may be made after the two years have expired, if it does not state a new cause of action.<sup>52</sup> An important question is presented where the injured employe does not die because of his injuries until some time after he has received them—a year, for instance. Must the action be brought within two years from the date of his injury or within two years from the date of his death? A little consideration of this question will show that the suit can be brought within two years after the death and that the date of the injury is immaterial in this respect. While the injured person was alive he could have no administrator, nor could his parents, wife, children or next of kin dependent upon him bring an action because of his injuries; and if he brought the action he would be entitled to the damages recovered and not they. So much so is this true that if he brought the action and then died before verdict or judgment his administrator cannot be substituted as plaintiff, but must bring a new action. The administrator's right of action is a new and independent one, and is not a survival of the deceased's cause of action.<sup>53</sup>

<sup>49</sup> *Hanna v. Jeffersonville R. Co.* 32 Ind. 113.

<sup>50</sup> *Andrews v. Hartford, etc., R. Co.* 34 Conn. 57; *Sherman v. Western Stage Co.* 24 Iowa, 515; see *Louisville, etc., R. Co. v. Sanders*, 86 Ky. 259; 5 S. W. Rep. 563.

<sup>51</sup> *Fowlkes v. Nashville, etc., R. Co.* 5 Baxt. 603; 9 Heisk. 829; see *Bledsoe v. Stokes*, 1 Baxt. 312, and *Flatley v. Memphis, etc., R. Co.* 9 Heisk. 230.

<sup>52</sup> *City of Bradford v. Downs*,

126 Pa. St. 622; 17 Atl. Rep. 884; *Jeffersonville, etc., R. Co. v. Hendricks*, 41 Ind. 48; *Kuhns v. Wisconsin, etc., Ry. Co.* 76 Iowa, 67; 40 N. W. Rep. 92; *Moody v. Pacific R. Co.* 68 Mo. 470; *Daley v. Boston, etc., R. Co.* 147 Mass. 101; 16 N. E. Rep. 690.

<sup>53</sup> *Dillier v. Cleveland, etc., R. Co.* 34 Ind. App. 52; 72 N. E. Rep. 271; *Hilliker v. Citizens St. Ry. Co.* 152 Ind. 86; 52 N. E. Rep. 607; *Pittsburg, etc., R. Co. v. Hosea*, 152 Ind. 412; 53 N. E.

It necessarily follows that the statute begins to run from the date of the death of the injured person.

§ 89. **Complaint.**—It is clear that the complaint or declaration must show that persons were alive, at least at the time of the death of the injured person, who come within some one of the clauses of the statute, and who would be entitled to the damages recovered; and this fact must be supported by proof.<sup>54</sup> If the names of those entitled to share in the damages be given, it is not necessary to show there are no such others.<sup>55</sup> While it is proper to allege facts showing a pecuniary loss to the beneficiaries,<sup>56</sup> yet that is not necessary, for the court will presume damages followed.<sup>57</sup> It need not be averred that there was an immediate death, an averment of a mediate death being sufficient.<sup>58</sup> The complaint must show the plaintiff's capacity to sue.<sup>59</sup> It must also show the same facts, except the matter of damages, the deceased would have been required to allege if he had when alive brought

Rep. 419; *Malott v. Shimer*, 153 Ind. 35; 54 N. E. Rep. 101; *Hedekin v. Gillespie*, 33 Ind. App. 650; 72 N. E. Rep. 143; *All v. Barnwell County*, 29 S. C. 161; 7 S. E. Rep. 58.

<sup>54</sup> *Webster v. Norwegian Min. Co.* 137 Cal. 399; 70 Pac. Rep. 276; *Oulighan v. Butler*, 189 Mass. 287; 75 N. E. Rep. 726; *Chicago, etc., R. Co. v. La Porte*, 33 Ind. App. 691; 71 N. E. Rep. 166; *St. Louis, etc., R. Co. v. Black*, 79 Ark. 179; 95 S. W. Rep. 155; *Southern R. Co. v. Maxwell*, 113 Tenn. 464; 82 S. W. Rep. 1137; *Chicago, etc., R. Co. v. Kinmare*, 115 Ill. App. 132.

<sup>55</sup> *Peers v. Nevada, etc., Co.* 119 Fed. Rep. 400; *Barnes v. Ward*, 9 C. B. 392.

<sup>56</sup> *Union Pac. R. Co. v. Roeser*

(Neb.) 95 N. W. Rep. 68.

<sup>57</sup> *Peers v. Nevada, etc., Co.* 19 Fed. Rep. 400; *Peden v. American Bridge Co.* 120 Fed. Rep. 523; *Kenney v. New York, etc., Co.* 49 Hun, 535; 2 N. Y. Supp. 512; *Wescott v. Central Vt. R. Co.* 61 Vt. 438; 17 Atl. Rep. 745; *Barnum v. Chicago, etc., R. Co.* 30 Minn. 461; 16 N. W. Rep. 364; *Kelley v. Chicago, etc., R. Co.* 60 Wis. 381; 7 N. W. Rep. 291; *Korady v. Lake Shore, etc., R. Co.* 131 Ind. 261; 29 N. E. Rep. 1069; *Chicago, etc., R. Co. v. Thomas*, 155 Ind. 634; 58 N. E. Rep. 1040.

<sup>58</sup> *Carrigan v. Stillwell*, 97 Me. 247; 54 Atl. Rep. 389; 61 L. R. A. 163.

<sup>59</sup> *Martin v. Butte* (Mont.) 86 Pac. Rep. 264.

a suit to recover damages for the same injury.<sup>60</sup> It need not be alleged that the damages had not been paid.<sup>61</sup> It must be shown that the injured person had died;<sup>62</sup> but it need not necessarily be proven of the precise date alleged when it took place.<sup>63</sup> It is, in fact, not necessary to set out the names of the beneficiaries, it being sufficient to allege that he left a parent, or wife or children or next of kin (perhaps stating they were brothers, sisters or cousins) dependent upon him;<sup>64</sup> though the better practice is to name them.<sup>65</sup> It is not fatal to describe some as beneficiaries who are not if others be named who are.<sup>66</sup> Where a complaint alleged the deceased left as his "only heirs at law" a father and mother, it was held not necessary to allege he left neither wife nor children.<sup>67</sup> The appointment of the plaintiff as administrator need not be expressly alleged, where he brings the suit in his representative capacity.<sup>68</sup> In jurisdictions where it has been necessary to allege that a plaintiff was without fault contributing to the injuries, it has been

<sup>60</sup> *Trott v. Birmingham R. Co.* 144 Ala. 383; 39 So. Rep. 716; *Rosney v. Erie R. Co.* 124 Fed. Rep. 90; *Birmingham, etc., Ry. Co. v. Gunn*, 141 Ala. 372; 37 So. Rep. 329; *Dorsey v. Columbus R. Co.* 121 Ga. 697; 49 S. E. Rep. 698; *United, etc., Co. v. State*, 100 Md. 634; 60 Atl. Rep. 248.

<sup>61</sup> *Louisville, etc., R. Co. v. Summers*, 125 Fed. Rep. 719.

<sup>62</sup> *Denver, etc., R. Co. v. Gunning*, 33 Colo. 280; 80 Pac. Rep. 727.

<sup>63</sup> *International, etc., R. Co. v. Glover*, 13 Tex. Civ. App. 263; 88 S. W. Rep. 515.

<sup>64</sup> *Jeffersonville, etc., R. Co. v. Hendricks*, 41 Ind. 48; *Dugan v. Meyers*, 30 Ind. App. 237; 65 N. E. Rep. 1046; *Commercial Club v. Hilliker*, 20 Ind. App. 239; 50 N. E. Rep. 578; *Korrady v. Lake*

*Shore, etc., R. Co.* 131 Ind. 261; 29 N. E. Rep. 1069; *Clore v. McIntire*, 120 Ind. 262; 22 N. E. Rep. 128; *Conant v. Griffin*, 48 Ill. 410; *Howard v. Delaware, etc., R. Co.* 40 Fed. Rep. 195.

<sup>65</sup> *Pennsylvania Co. v. Coyer*, 163 Ind. 631; 72 N. E. Rep. 875; *Barnum v. Chicago, etc., R. Co.* 30 Minn. 461; 16 N. W. Rep. 364.

<sup>66</sup> *Clore v. McIntire*, 120 Ind. 262; 22 N. E. Rep. 128; *Korrady v. Lake Shore, etc., R. Co.* 131 Ind. 261; 29 N. E. 1069.

<sup>67</sup> *Chicago, etc., R. Co. v. La Porte*, 33 Ind. App. 691; 71 N. E. Rep. 166.

<sup>68</sup> *Chicago, etc., R. Co. v. Cummins*, 24 Ind. App. 192; 53 N. E. Rep. 1026; *Louisville, etc., R. Co. v. Trammell*, 93 Ala. 350; 9 So. Rep. 870; *Bowler v. Lane*, 9 Met. (Ky.) 311.

held not necessary to allege that the administrator, or even the beneficiaries, were free from fault,<sup>69</sup> but under the present statute even this allegation is not necessary. If the complaint does set out the names of the beneficiaries, proof as to their sex is immaterial.<sup>70</sup> The appointment of the plaintiff as administrator is not put in issue by a general denial, and so need not be proven.<sup>71</sup> An amendment is allowable which adds different allegations in respect to the defendant's negligence,<sup>72</sup> or more particulars,<sup>73</sup> or adds an allegation that the deceased left a wife and children.<sup>74</sup>

§ 90. **Damages by way of solatium.**—Damages cannot be allowed by way of *solatium* for the grief and wounded feelings of the beneficiaries.<sup>75</sup>

§ 91. **Damages for suffering of deceased—Medical and funeral expenses.**—Damages cannot be recovered for the

<sup>69</sup> Chicago, etc., R. Co. v. La Porte, 33 Ind. App. 691; 71 N. E. Rep. 166.

<sup>70</sup> O'Callaghan v. Bode, 84 Cal. 489; 24 Pac. Rep. 269.

<sup>71</sup> Ewen v. Chicago, etc., R. Co. 38 Wis. 613; Union Ry., etc., Co. v. Shacklet, 119 Ill. 232; 10 N. E. Rep. 896.

If his letters of administration have been revoked, that fact must be put in issue by a special plea. Burlington, etc., R. Co. v. Crockett, 17 Neb. 570; 24 N. W. Rep. 219.

<sup>72</sup> Daley v. Boston, etc., R. Co. 147 Mass. 101; 16 N. E. Rep. 690.

<sup>73</sup> Harris v. Central R. Co. 78 Ga. 525; 3 S. E. Rep. 355.

<sup>74</sup> South Carolina R. Co. v. Nix, 68 Ga. 572; see Haynie v. Chicago, etc., R. Co. 9 Ill. App. 105.

<sup>75</sup> Blake v. Midland Ry. Co. 18 Q. B. 93; 21 L. J. Q. B. 233; 16 Jur. 562; Illinois Cent. R. Co. v. Barron, 5 Wall. 90; 18 L. Ed. 591;

affirming 1 Biss. 453; Fed. Cas. No. 1,053; Wharton v. Chicago, etc., R. Co. 2 Biss. 282; S. C. 13 Wall. 270; Kansas Pacific Ry. Co. v. Cutter, 19 Kan. 93; State v. Baltimore, etc., Ry. Co. 24 Md. 84; City of Chicago v. Scholten, 75 Ill. 468; Little Rock, etc., Ry. Co. v. Barker, 33 Ark. 350; Mynning v. Detroit, etc., Co. 59 Mich. 257; 26 N. W. Rep. 514; Hutchins v. St. Paul, etc., R. Co. 44 Minn. 5; 46 N. W. Rep. 79; Anderson v. Chicago, etc., R. Co. 35 Neb. 95; 52 N. W. Rep. 840; Besenecker v. Sale, 8 Mo. App. 211; Tilley v. Hudson, etc., Co. 29 N. Y. 252; 24 N. Y. 471; Pennsylvania Co. v. Zebe, 33 Pa. St. 318; March v. Walker, 48 Tex. 375; Louisville, etc., R. Co. v. Rush, 127 Ind. 545; 26 N. E. Rep. 1010; Morgan v. Southern Pac. R. Co. 95 Cal. 510; 30 Pac. Rep. 603; Canadian Pac. Ry. Co. v. Robinson, 14 Can. Sup. Ct. 105.

physical and mental suffering of the deceased;<sup>76</sup> nor can they be recovered for medical and funeral expenses.<sup>77</sup>

**§ 92. Measure of damages.**—It will be observed that the statute does not undertake to fix a limit as to the amount of damages recoverable. Therefore, the courts are at liberty to apply the usual rules followed in such instances. The question is, "What loss did the beneficiaries suffer by the death of the deceased?" In ascertaining that loss the age of the deceased, his earning capacity, his probable earnings, his habits of industry, his drinking habits, and any other fact bearing upon his capacity to furnish the beneficiaries a livelihood may be considered.<sup>78</sup> The special aptitude of the de-

<sup>76</sup> *Blake v. Midland Ry. Co.* 18 Q. B. 93; 21 L. J. Q. B. 233; 16 Jur. 562; *Illinois Cent. R. Co. v. Barron*, 5 Wall. 90; 18 L. Ed. 591; affirming 1 Biss. 453; Fed. Cas. No. 1053; *Railroad Co. v. Whitton*, 13 Wall. 270; 20 L. Ed. 571; affirming 2 Biss. 282; Fed. Cas. No. 17,597; *Oldfield v. New York, etc., R. Co.* 14 N. Y. 310; *Donaldson v. Mississippi, etc., R. Co.* 18 Iowa, 280; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Potter v. Chicago, etc., R. Co.* 21 Wis. 372; *Southern, etc., Co. v. Bradley*, 52 Tex. 587; *Kansas Pac. Ry. Co. v. Cutter*, 19 Kan. 83.

<sup>77</sup> *Dolton v. South Eastern R. Co.* 4 C. B. (N. S.) 296; 4 Jur. (N. S.) 711; 27 L. J. C. P. 227.

It has been argued that the administrator may recover the same damages the deceased employee would have recovered if he had pressed his cause of action to judgment before his death. But that argument was based upon a desire or effort to show that the administrator's cause of action accrued when the injury

was inflicted, and not when death supervened, and thus enable the defendant employer to take advantage of the statute of limitations when he could not do so if the cause of action did not accrue to the administrator until death occurred.

The writer is of the opinion that the better rule is stated in the text, and that it was not the intention of Congress to allow the administrator to recover damages for the sufferings of the deceased, but for the support of those dependent upon him, and thus prevent them becoming burdens upon the public for their support. This is the moving incentive for the enactment of the statute allowing a recovery by the administrator; and in the light of this incentive this statute must be construed.

<sup>78</sup> *Kaght v. Sadtler, etc., Co.* 91 Mo. App. 574; *St. Louis, etc., Ry. Co. v. Bowles* (Tex. Civ. App.) 72 S. W. Rep. 451; *Watson v. Seaboard, etc., R. Co.* 133 N. C. 188; 45 S. E. Rep. 555; *Davidson, etc., Co. v. Severson*, 109 Tenn. 572; 72 S. W. Rep. 967; *Neal v.*



ceased for a particular trade may be considered.<sup>79</sup> So his health may be shown as bearing upon his earning capacity.<sup>80</sup> His disposition to contribute to the support of those dependent upon him, or to that of his wife, children or parents, is a factor to be considered.<sup>81</sup> In the case of a widow, at least, the amount of damages she suffered may be based upon the length of time the deceased would probably have lived,<sup>82</sup> and this is not affected by her subsequent marriage.<sup>83</sup> Where the deceased had a child, the value of his services for the care and education of such child may be taken into consideration,<sup>84</sup> as well as his probable increase of earning power.<sup>85</sup> Where the wife is the beneficiary, the measure of damages is the probable amount she would have received if he had lived and not his probable earnings.<sup>86</sup> If the beneficiaries are next of kin dependent upon him, proof of mere relationship is not sufficient; the actual fact of expectancy must be shown.<sup>87</sup>

Wilmington, etc., Co. 3 Penn. (Del.) 467; *Carter v. North Carolina R. Co.* 139 N. C. 499; 52 S. E. Rep. 642; *Beaumont, etc., R. Co. v. Dilworth*, 16 Tex. Civ. App. 257; 94 S. W. Rep. 352; *Knott v. Peterson*, 125 Ia. 404; 101 N. W. Rep. 173; *San Antonio, etc., R. Co. v. Brock* (Tex. Civ. App.), 80 S. W. Rep. 422.

<sup>79</sup> *Snyder v. Lake Shore, etc., Ry. Co.* 131 Mich. 418; 91 N. W. Rep. 643; *Evarts v. Santa Barbara, etc., R. Co.* (Cal. App.); 86 Pac. Rep. 830; *Reiter, etc., Co. v. Howlin*, 144 Ala. 192; 40 So. Rep. 280.

<sup>80</sup> *Coffey, etc., Co. v. Carter*, 65 Kan. 565; 70 Pac. Rep. 635.

<sup>81</sup> *Fajardo v. New York Cent. R. Co.* 84 N. Y. App. Div. 354.

<sup>82</sup> *Cox v. Wilmington, etc., Ry. Co.* 4 Penn. 162 (Del.); 53 Atl. Rep. 569.

<sup>83</sup> *Consolidated Store Co. v. Morgan*, 160 Ind. 241; 66 N. E. Rep. 696; *Chicago, etc., R. Co. v. Driscoll*, 207 Ill. 9; 69 N. E. Rep.

620; but see *Hewill v. East, etc., Co.* (Mich.) 98 N. W. Rep. 992.

<sup>84</sup> *Cameron, etc., Co. v. Anderson*, 98 Tex. 156; 81 S. W. Rep. 282.

Mortality tables may be based on the expectancy of life. *Mix v. Hamburg, etc., Co.* 85 N. Y. App. Div. 475; 83 N. Y. St. 322; *Knott v. Peterson*, 125 Ia. 404; 101 N. W. Rep. 524; *Ft. Worth, etc., R. Co. v. Linthicum*, 33 Tex. Civ. App. 375; 77 S. W. Rep. 40.

<sup>85</sup> *Halverson v. Seattle El. Co.* 35 Wash. 600; 77 Pac. Rep. 1058; *Barnes v. Columbia Lead Co.* 107 Mo. App. 608; 82 S. W. Rep. 203.

<sup>86</sup> *Reed v. Queen Anne R. Co.* 4 Penn. (Del.) 413; 57 Atl. Rep. 529; *Houston, etc., R. Co. v. Turner*, 34 Tex. Civ. App. 397; 78 S. W. Rep. 712 (jury to consider whether a less sum presently paid would compensate her.)

<sup>87</sup> *Standard, etc., Co. v. Munsey*, 33 Tex. Civ. App. 416; 76 S. W. Rep. 931.

Declarations of deceased evincing a probable support are admissible.<sup>88</sup> If the suit is for the loss of a wife, the husband being the beneficiary, the fact of his remarriage cannot be shown.<sup>89</sup> The jury must determine the amount of the loss, and to do this may apply their own observation, experience and knowledge to the circumstances of the case;<sup>90</sup> but they must confine themselves to the evidence.<sup>91</sup> The expectancy of the life of the deceased may be shown;<sup>92</sup> but to show this the longevity of the father or mother of the deceased cannot be shown.<sup>93</sup> If the beneficiaries are dependent upon the deceased, then their expectancy in life may be shown.<sup>94</sup> The fact that the deceased father may have become impoverished if he had lived, and thus a burden to his children, need not be considered by the jury.<sup>95</sup> It cannot be shown what would be the cost of an annuity bond on the deceased's expectancy of life which would be sufficient to produce an annual income equal to his annual income at the time of his death.<sup>96</sup> In case of the death of a parent leaving a minor child, the child's loss of care, education, support and moral training is a subject for the jury's consideration;<sup>97</sup> and it may also be shown in defense that he had abandoned it;<sup>98</sup> or his solicitude

<sup>88</sup> *Gulf, etc., R. Co. v. Brown*, 33 Tex. Civ. App. 269; 76 S. W. Rep. 794.

<sup>89</sup> *International, etc., Ry. Co. v. Boykin* (Tex. Civ. App.) 85 S. W. Rep. 1163; *St. Louis, etc., R. Co. v. Cleere* (Ark.) 88 S. W. Rep. 995 (a wife remarrying.)

<sup>90</sup> *Denver, etc., R. Co. v. Gunning*, 33 Colo. 280; 80 Pac. Rep. 727; *Utah, etc., Co. v. Diamond, etc.*, Co. 26 Utah, 299; 73 Pac. Rep. 524.

<sup>91</sup> *Cleveland, etc., R. Co. v. Drumm*, 32 Ind. App. 547; 70 N. E. Rep. 286.

<sup>92</sup> *Coffeyville, etc., Co. v. Carter*, 65 Kan. 565; 70 Pac. Rep. 635; *Haines v. Pearson*, 100 Mo. App. 551; 75 S. W. Rep. 194; *Jones v.*

*Kansas City*, 178 Mo. 528; 77 S. W. Rep. 890.

<sup>93</sup> *Hinsdale v. New York, etc., R. Co.* 81 N. Y. App. Div. 617.

<sup>94</sup> *The Dauntless*, 121 Fed. Rep. 420.

<sup>95</sup> *Stemples v. Metropolitan St. Ry. Co.* 174 N. Y. 512; 66 N. E. Rep. 1117.

<sup>96</sup> *Hinsdale v. New York, etc., R. Co.* 81 N. Y. App. Div. 617.

<sup>97</sup> *Ganoche v. Johnson, etc., Co.* 116 Mo. App. 506; 92 S. W. Rep. 918; *Beaumont, etc., Co. v. Dilworth*, 16 Tex. Ct. Rep. 257; 94 S. W. Rep. 352; *Texas, etc., R. Co. v. Green*, 15 Tex. Ct. Rep. 133; 95 S. W. Rep. 694.

<sup>98</sup> *Beaumont, etc., Co. v. Dilworth*, *supra*.

for its moral training.<sup>99</sup> In case of the death of a minor child, the value of his services until maturity may be recovered;<sup>100</sup> and it may be shown that he was obedient, industrious and economical.<sup>101</sup> But it should be observed that the damages to the child are not limited to those which accrued during his minority.<sup>102</sup> If a parent is the beneficiary, then damages may be awarded for reasonable expectation of the parent of benefits that might have accrued for the services and society of the deceased child;<sup>103</sup> but not for grief or anguish to the parent nor for sufferings of the child.<sup>104</sup> The parent when dependent on the child is entitled to recover more than nominal damages.<sup>105</sup> The amount of property left by the deceased is not a subject of inquiry,<sup>106</sup> nor the pecuniary resources of the widow or next of kin or their unfortunate condition.<sup>107</sup> Declarations of the deceased concerning efforts of his children to get his property away from him are not admissible.<sup>108</sup> The physical condition of the beneficiary cannot be shown;<sup>109</sup> nor loss of society and grief.<sup>109\*</sup>

<sup>99</sup> St. Louis, etc., R. Co. v. Mathias (Ark.), 91 S. W. Rep. 763.

<sup>100</sup> Cumberland, etc., Co. v. Anderson, 89 Miss. 732; 41 So. Rep. 263.

<sup>101</sup> Anthony, etc., Co. v. Ashby, 198 Ill. 562; 64 N. E. Rep. 1109; Stempels v. Metropolitan St. Ry. Co. 174 N. Y. 512; 66 N. E. Rep. 1117; St. Louis, etc., Ry. Co. v. Haist, 71 Ark. 258; 72 S. W. Rep. 893.

<sup>102</sup> Galveston, etc., Ry. Co. v. Puente, 30 Tex. Civ. App. 246; 70 S. W. Rep. 362.

<sup>103</sup> Chicago, etc., R. Co. v. Beaver, 190 Ill. 34; 65 N. E. Rep. 144; Corbett v. Oregon, etc., R. Co. 25 Utah, 449; 71 Pac. Rep. 1065; Draper v. Tucker, 60 Neb. 434; 95 N. W. Rep. 1026.

<sup>104</sup> Corbett v. Oregon, etc., Ry. Co. *supra*.

<sup>105</sup> Bowerman v. Lackawanna

Mining Co. (Mo. App.) 71 S. W. Rep. 1062.

<sup>106</sup> Chicago, etc., R. Co. v. Holmes, 68 Neb. 826; 94 N. W. Rep. 1007.

<sup>107</sup> Pittsburg, etc., R. Co. v. Kinmare, 203 Ill. 388; 67 N. E. Rep. 826.

<sup>108</sup> Brown v. Southern Ry. Co. 65 S. C. 260; 43 S. E. Rep. 794.

<sup>109</sup> Seattle, etc., Co. v. Hartless, 144 Fed. Rep. 379; *contra*, Evarts v. Santa Barbara, etc., R. Co. 3 Cal. App. 712; 86 Pac. Rep. 830; Emery v. Philadelphia, 208 Pa. St. 492; 57 Atl. Rep. 977; Fidelity, etc., Co. v. Buzzard, 69 Kan. 330; 76 Pa. St. 832; Texas, etc., R. Co. v. Green, 15 Tex. Ct. Rep. 133; 95 S. W. Rep. 694; Texarkana, etc., R. Co. v. Fugier, 16 Tex. Ct. Rep. 724; 95 S. W. Rep. 563.

<sup>109\*</sup> *Contra*, Evarts v. Santa Barbara, etc., R. Co. *supra*; Brick-

§ 93. **Interest.**—Interest cannot be added by the jury or court upon the amount due, because the statute does not provide for it.<sup>110</sup>

§ 94. **Damages not part of the estate.**—As the amount recovered is for the benefit of the beneficiaries it forms no part of the estate,<sup>111</sup> and cannot be taken to pay its debts.<sup>112</sup> Thus, damages occasioned to his employer by the deceased cannot be set off against the amount recoverable for his death.<sup>113</sup>

§ 95. **Judgment recovered by deceased.**—A judgment recovered by the deceased during his lifetime because of his injuries is a complete bar to a suit by his administrator to recover for the beneficiaries;<sup>114</sup> but the commencement merely of an action is not.<sup>115</sup>

§ 96. **Costs.**—The administrator is not liable personally for the costs of the suit,<sup>116</sup> but the estate he represents is liable, if, at least, solvent.<sup>117</sup>

man v. Southern R. Co. 74 S. C. 306; 54 S. E. Rep. 553; Parker v. Crowell, etc., Co. 115 La. 463; 39 So. Rep. 445; Kelley v. Ohio, etc., R. Co. 58 W. Va. 216; 52 S. E. Rep. 520.

Punitive damages cannot be allowed. The recovery is the damages "resulting" from the death.

The photograph of the deceased cannot be used to show his physical condition. Smith v. Lehigh, etc., R. Co. 177 N. Y. 379; 69 N. E. Rep. 729.

<sup>110</sup> Central R. Co. v. Sears, 66 Ga. 499; Cook v. New York, etc., R. Co. 10 Hun, 426.

<sup>111</sup> Gottlieb v. North Jersey St. Ry. Co. 72 N. J. L. 480; 63 Atl. Rep. 339; Cleveland, etc., R. Co. v. Osgood, 34 Ind. App. 34; 73 N. E. Rep. 285.

<sup>112</sup> *In re Williams Est.* 130 Iowa, 553; 107 N. W. Rep. 608; Western R. Co. v. Russell, 144 Ala. 142; 39 So. Rep. 311.

<sup>113</sup> Western R. Co. v. Russell, *supra*.

<sup>114</sup> Hecht v. Ohio, etc., R. Co. 132 Ind. 507; 32 N. E. Rep. 302; 54 Am. & Eng. R. Cas. 75.

<sup>115</sup> International, etc., R. Co. v. Kuehn, 70 Tex. 582; 8 S. W. Rep. 484.

<sup>116</sup> Evans v. Newland, 34 Ind. 112; Kinney v. Central R. Co. 34 N. J. L. 273; see Hicks v. Barrett, 40 Ala. 291.

<sup>117</sup> Chicago, etc., R. Co. v. Harshman, 21 Ind. App. 23; 51 N. E. Rep. 343.

§ 97. **Death of beneficiary.**—If the beneficiary die, even after suit brought, the suit abates.<sup>118</sup> And where an action is brought for the widow who is the sole beneficiary and she dies, an action cannot be thereafter prosecuted for the benefit of the deceased's parent or next of kin dependent upon him.<sup>119</sup> But if there be two or more beneficiaries standing in the first or second order exclusively, and one die, the action may be prosecuted for those living.<sup>120</sup>

§ 98. **Declarations of deceased.**—If the declarations of the deceased formed a part of the *res gestae*, they are admissible;<sup>121</sup> but if they do not form a part of the *res gestae* they are not admissible.<sup>122</sup>

§ 99. **Distribution of amount recovered.**—The federal statute makes no provision for the distribution of the amount recovered. How the amount shall be distributed is left to

<sup>118</sup> Dillier v. Cleveland, etc., R. Co. 34 Ind. App. 52; 72 N. E. Rep. 271 (disapproving of Jeffersonville, etc., R. Co. v. Hendricks, 41 Ind. 48); Woodward v. Chicago, etc., R. Co. 23 Wis. 400; Railroad v. Bean, 94 Tenn. 388; 29 S. W. Rep. 370; Railway Co. v. Lilly, 90 Tenn. 563; 18 S. W. Rep. 243; 49 Am. & Eng. R. Cas. 495; Chivers v. Rogers, 50 La. Ann. 57; 23 So. Rep. 100; Saunders v. Louisville, etc., R. Co. 40 C. C. A. 465; 111 Fed. Rep. 708; Hennessey v. Bavarian, etc., Co. 145 Mo. 104; 46 S. W. Rep. 966.

<sup>119</sup> Railroad Co. v. Bean, *supra*.  
<sup>120</sup> Senn v. Southern Ry. Co. 124 Mo. 621; 28 S. W. Rep. 66. If an administrator die, his successor does not bring the action. Hodges v. Webber, 65 N. Y. App. Div. 170; 72 N. Y. Supp. 508.

<sup>121</sup> Brownell v. Pacific R. Co. 47

Mo. 240; Fordyce v. McCouts, 51 Ark. 509; 11 S. W. Rep. 694; Little Rock, etc., R. Co. v. Leverett, 48 Ark. 333; 3 S. W. Rep. 50; Richmond, etc., Co. v. Hammond, 93 Ala. 181; 9 So. Rep. 577; Merkle v. Bennington Tp. 58 Mich. 156; 24 N. W. Rep. 776; McKeigue v. City of Janesville, 68 Wis. 50; 31 N. W. Rep. 298; Galveston v. Barbour, 62 Tex. 172; Stockmann v. Terre Haute, etc., R. Co. 15 Mo. App. 503; Entwhistle v. Feighner, 60 Mo. 214.

<sup>122</sup> Pennsylvania R. Co. v. Long, 94 Ind. 250; City of Bradford v. Downs, 126 Pa. St. 622; 17 Atl. Rep. 884; Louisville, etc., R. Co. v. Berry, 2 Ind. App. 427; 28 N. E. Rep. 714; *contra*, Perigo v. Chicago, etc., R. Co. 55 Iowa, 326; 7 N. W. Rep. 621; Lord v. Pueblo, etc., R. Co. 12 Colo. 390; 21 Pac. Rep. 148.

the laws of the state where the administrator is appointed.<sup>122</sup> The mere fact that a child was not named in the complaint as a beneficiary will not deprive him of his share.<sup>124</sup>

**§99a. Right of widow to sue under state statute.**—Some of the state statutes give to a widow the right to sue when her husband is killed while engaged in interstate commerce. Can she sue? Can his administrator sue? Can they both sue? Can one sue and bar the suit of the other? These are very important questions if the act be not construed as exclusive. If it be not so construed, then two suits might be brought, one by the widow, the other by the administrator. Would the courts allow two recoveries; or would a recovery in one be a bar to the other? If the widow accepted her share of the damages received by the administrator, she would clearly estop herself to bring or maintain an action to recover damages; for she could not claim the right to recover or receive two damages. But if she has the right to bring a suit and recover damages, then the fact that the administrator brought an action and recovered damages cannot be pleaded as a bar to her action; and *vice versa*. If the act, however, is exclusive, then she has no right to bring and maintain an action; but must look to the administrator's suit for her redress.

<sup>122</sup> *Denver, etc., R. Co. v. Waring*, 37 Colo. 122; 86 Pac. Rep. 305; *Hartley v. Hartley*, 71 Kan. 691; 81 Pac. Rep. 505.

See note 13 of this chapter.

<sup>124</sup> *Oyster v. Burlington, etc., Co.* 65 Neb. 719; 91 N. W. Rep. 699; 59 L. R. A. 291; *Duzan v. Myers*, 30 Ind. App. 227; 65 N. E. Rep. 1046.

## CHAPTER VI.

### RELEASE OF CLAIM FOR DAMAGES.

#### SECTION.

100. What contracts of release forbidden.

101. Receipt of relief money.

#### SECTION.

102. Contract for future release not binding on beneficiaries.

103. Release by beneficiary.

§ 100. **What contracts of release forbidden.**—The statute concerning releases of the railroad from liability because of injuries received by the employe is very broad. It prohibits “any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act,” and declares that it shall be void. It is difficult to say just what interpretation the courts will give this statute, as it is in derogation of the right of contract but in the interest of public policy. Where a statute provided that, “All contracts made by railroads \* \* \* with their employes, or rules or regulations adopted by any corporation releasing it from liability to any employe having a right of action under the provisions” of the statute, were “declared null and void,” it was held that a contract with a voluntary relief department maintained by a railroad of which an employe was a member, to the effect that if he accepted benefits because of his injuries from such relief department he waived his right of action against the railroad company to recover damages because of such injuries, did not fall within the prohibition of the statute and was valid. The employe had his choice: if he received relief money from the voluntary relief association, he released the railroad company; and if he *brought* suit against the railroad company he released the relief department. The contract was upheld notwithstanding the

statute.<sup>1</sup> In construing a similar contract, it was said by one court: "But even in cases of injury through the company's negligence there is no waiver of any right of action that the person injured may thereafter be entitled to. It is not the signing of the contract but the acceptance of benefits after the accident that constitutes the release. The injured party, therefore, is not stipulating for the future, but settling for the past; he is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby."<sup>2</sup> In still another case from the same state, it was said: "In the present case there is an additional agreement that the plaintiff shall 'execute such further instrument as may be necessary formally to evidence such acquittance,' and it is urged that no such defense has been executed by plaintiff. But it is not necessary that it should be. The acceptance of benefits is the substance of the release, and the agreement for a further instrument is by its express terms a mere formality for convenience of evidence."<sup>3</sup> "The contract forbidden by statute is one relieving the

<sup>1</sup> *Pittsburg, etc., R. Co. v. Moore*, 152 Ind. 345; 53 N. E. Rep. 290; 44 L. R. A. 638; *Pittsburg, etc., R. Co. v. Hosea*, 152 Ind. 412; 53 N. E. Rep. 419; *Pittsburg, etc., R. Co. v. Montgomery*, 152 Ind. 1; 45 N. E. Rep. 582, is overruled.

This section of the Federal statute is undoubtedly constitutional if the preceding sections are.

<sup>2</sup> *Johnson v. Philadelphia, etc., R. Co.* 163 Pa. St. 127; 29 Atl. Rep. 854.

<sup>3</sup> *Ringle v. Pennsylvania R. Co.* 164 Pa. St. 529; 30 Atl. Rep. 492; 44 Am. St. Rep. 628. To same result is *Otis v. Pennsylvania Co.* 71 Fed. Rep. 136; *Shaver v. Pennsylvania Co.* 71 Fed. Rep. 931; *Pittsburg, etc., R. Co. v. Cox*, 55 Ohio St. 497; 45 N. E. Rep. 641; 35 L. R. A. 507; *Donald v. Chi-*

*cago, etc., R. Co.* 93 Iowa, 284; 61 N. W. Rep. 971; 33 L. R. A. 492; *Fuller v. Baltimore etc., Assn.* 67 Md. 433; 10 Atl. Rep. 237; *Chicago, etc., R. Co. v. Curtis*, 51 Neb. 442; 71 N. W. Rep. 42; *Maine v. Chicago, etc., R. Co. (Iowa)*; 70 N. W. Rep. 630; *Leese v. Pennsylvania Co.* 10 Ind. App. 47; 37 N. E. Rep. 420; *Chicago, etc., R. Co. v. Miller*, 22 C. C. A. 264 (inferentially disproving the decision below, reported in 65 Fed. Rep. 305); *State v. Baltimore, etc., R. Co.* 36 Fed. Rep. 655; *Owens v. Baltimore, etc., R. Co.* 35 Fed. Rep. 715; 1 L. R. A. 75; *Eckman v. Chicago, etc., R. Co.* 169 Ill. 312; 48 N. E. Rep. 496; 38 L. R. A. 750; *Pittsburg, etc., R. Co. v. Elwood*, 25 Ind. App. 671; 58 N. E. Rep. 866.



company from liability for the future negligence of itself and employes," said the Supreme Court of Indiana. "The contract pleaded does not provide that the company shall be relieved from liability. It expressly recognizes that enforceable liability may arise, and only stipulates that if the employe shall prosecute a suit against the company to final judgment, he shall thereby forfeit his right to the relief fund, and, if he accepts compensation from the relief fund, he shall thereby forfeit his right of action against the company. It is nothing more or less than a contract for a choice between sources of compensation, where but a single one existed, and is the final choice—the acceptance of one against the other—that gives validity to the transaction."<sup>4</sup> If the railroad goes into the hands of a receiver, and the employe continues on in the service of the receiver, such contract remains in force

For cases on this point, see *Johnson v. Philadelphia, etc.*, R. Co. 163 Pa. St. 127; 29 Atl. Rep. 854; *Hamilton v. St. Louis, etc.*, R. Co. 118 Fed. Rep. 92; *Graft v. Baltimore, etc., Ry. Co. (Pa.)* 8 Atl. Rep. 206; *Chicago, etc.*, R. Co. v. *Wymore (Neb.)*, 58 N. W. Rep. 1120; *Ringle v. Pennsylvania R. Co. (Pa.)* 30 Atl. Rep. 492; *Chicago, etc.*, R. Co. v. *Bell (Neb.)*, 62 N. W. Rep. 314; *Johnson v. Railway Co.* 55 S. C. 152; 32 S. E. Rep. 2; 44 L. R. A. 645; *Beck v. Pennsylvania R. Co. (Pa.)* 43 Atl. Rep. 908; 76 Am. St. Rep. 211; *State v. Pittsburgh, etc.*, R. Co. (Ohio) 67 N. E. Rep. 93; 64 L. R. A. 405; 68 Ohio St. 9; *Petty v. Brunswick, etc.*, R. Co. (Ga.) 35 S. E. Rep. 82; *Pennsylvania R. Co. v. Chapman*, 220 Ill. 428; 77 N. E. Rep. 248; *Chicago, etc.*, R. Co. v. *Healy (Neb.)*, 107 N. W. Rep. 1005; 10 L. R. A. (N. S.) 198; *Chicago, etc.*, R. Co. v. *Bigley (Neb.)*, 95 N. W. Rep. 341; *Chicago, etc.*, R. Co. v. *Olsen (Neb.)*, 97 N. W. Rep. 831; 99

N. W. Rep. 847; *Walters v. Chicago, etc.*, R. Co. (Neb.) 104 N. W. Rep. 1066; *Baltimore, etc.*, R. Co. v. *Ray*, 36 Ind. App. 430; 73 N. E. Rep. 942; *Kinney v. Baltimore, etc.*, Assn. 35 W. Va. 385; 15 L. R. A. 142; 14 S. E. Rep. 8; *Fivey v. Pennsylvania R. Co. (N. J.)* 52 Atl. Rep. 472; 91 Am. St. Rep. 445; *Harrison v. Alabama, etc.*, R. Co. (Ala.) 40 So. Rep. 394; *Cannaday v. A. C. L.* 143 N. C. 439; 55 S. E. Rep. 836; 8 L. R. A. (N. S.) 939; *Black v. Baltimore, etc.*, R. Co. 36 Fed. Rep. 655; *Vickers v. Chicago, etc.*, R. Co. 71 Fed. Rep. 139; *Hamilton v. St. Louis, etc.*, R. Co. 118 Fed. Rep. 92; *Griffiths v. Earl of Dudley*, 9 Q. B. 357; *Clements v. Railroad Co.* 2 Q. B. 482; *State v. Pittsburgh, etc.*, R. Co. 68 Ohio St. 9; 67 N. E. Rep. 93; 64 L. R. A. 405.

<sup>4</sup>*Pittsburg, etc.*, R. Co. v. *Moore*, 152 Ind. 345; 53 N. E. Rep. 290; 44 L. R. A. 638; *Baltimore, etc.*, R. Co. v. *Ray*, 36 Ind. App. 430; 73 N. E. Rep. 942.

and applies to him if he be injured while in the employ of such receiver.<sup>5</sup> But in all cases the contract to release the defendant must specifically provide that the acceptance of the relief money shall have that effect.<sup>6</sup>

§ 101. **Receipt of relief money.**—The statute gives the defendant the right to set off “any sum it has contributed or paid to any insurance, relief benefit, or indemnity, that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which said action was brought.” This is a defense and must be brought forward by plea by the defendant; such a payment cannot be shown under the general denial any more than a settlement of the liability can be. After ascertaining the amount the plaintiff would otherwise be entitled to recover, the jury deducts therefrom the amount the injured person has received and returns a verdict for the balance. The court cannot make the deduction. The defendant may set off any sum it has contributed or paid to any insurance, or relief benefit it has paid, and it may also set off the amount of any “indemnity that may have been paid to the injured employe or the person entitled thereto on account of the injury or death.” It is the amount paid by the defendant that may be set off and also the amount the plaintiff has received for his injuries from any other source that may be set off. If the amount paid by the defendant has been deducted from his wages as they accrued, then the payment is not that of the defendant, but that of the plaintiff.<sup>7</sup> But the insurance or relief benefit must have been in force at the time of his injury, and he must have received pecuniary benefit therefrom; the defendant must have paid money for the insurance or benefit. Of course, money paid for the insurance

<sup>5</sup> Baltimore, etc., R. Co. v. Ray, 36 Ind. App. 430; 73 N. E. Rep. 942. Generally, see Oyster v. Burlington, etc., Co. 65 Neb. 789; 91 N. W. Rep. 699; 59 L. R. A. 291.

<sup>6</sup> Dover v. Mississippi, etc., R.

Co. 100 Mo. App. 330; 73 S. W. Rep. 298; Sturgiss v. Atlantic, etc., R. Co. (S. C.) 60 S. E. Rep. 939.

<sup>7</sup> It is usually an enforced payment.

or benefit by another common carrier cannot be deducted. Money received as an "indemnity" does not come from an outside source but has a connection with the defendant.<sup>8</sup>

**§ 102. Contract for future release not binding on beneficiaries.**—Irrespective of whether or not the employe is bound by his contract of release for future damages, the beneficiaries are not bound thereby, because they are not parties to the contract. Such a contract is not for their benefit.<sup>9</sup> This was held true where the deceased was a member of a relief association, and had agreed that the acceptance of the relief money should release his employer.<sup>10</sup> But the proviso to Section five evidently applies where the beneficiaries bring action for the death of the employe; and they will be bound by its provisions the same as the employe, except that if he be a member of a relief association and has not elected to accept the amount due therefrom, whereby his employer would be released, they would not be bound by any of its provisions, unless they elected to accept payment in accordance with the provisions of the contract.

**§ 103. Release by beneficiary.**—A release by the injured person in his lifetime and after his injuries of the defendant from its liabilities to him, or a settlement or the procuring of a judgment by him, is a complete bar to an action by his administrator.<sup>11</sup> So a settlement or compromise by the ad-

<sup>8</sup>It is clear that the word "indemnity" does not cover the case of ordinary life or accident insurance.

<sup>9</sup>Adams v. Northern Pac. R. Co. 95 Fed. 938; Illinois, etc., R. Co. v. Cozby, 69 Ill. App. 256; Maney v. Chicago, etc., R. Co. 49 Ill. App. 105; Strode v. St. Louis Transit Co. (Mo.) 87 S. W. Rep. 976.

<sup>10</sup>Cowen v. Ray, 47 C. C. A. 452; 108 Fed. Rep. 320; Chicago, etc., R. Co. v. Wymore, 40 Neb. 645; 58 N. W. Rep. 1120; Mc-

Kering v. Pennsylvania R. Co. 65 N. J. L. 57; 46 Atl. Rep. 715.

<sup>11</sup>Hecht v. Ohio, etc., R. Co. 132 Ind. 507; 32 N. E. Rep. 302; Littlewood v. Mayor, etc., 89 N. Y. 24, affirming 15 J. & S. 547; Ried v. Great Eastern Ry. Co. L. R. 3, Q. B. 555; 37 L. J. Q. B. 278; 18 L. T. (N. S.) 822; 16 W. R. 1040; Dibble v. New York, etc., R. Co. 25 Barb. 183; Southern, etc., Co. v. Cassin, 111 Ga. 575; 36 S. E. Rep. 881; Hill v. Pennsylvania R. Co. 178 Pa.

ministrator is a bar to the action,<sup>12</sup> but not without an order of court.<sup>13</sup> But neither the widow nor next of kin of the deceased can release the claim of the administrator.<sup>14</sup> Yet a beneficiary may release so much of the amount as he or she would be entitled to.<sup>15</sup> And if there be but one beneficiary, he or she (and so all of them) may compromise the claim in full.<sup>16</sup>

St. 223; 35 Atl. Rep. 997; 35 L. R. A. 196; 39 W. N. Cas. 221; *Price v. Railroad Co.* 33 S. C. 556; 12 S. E. Rep. 413; *Brown v. Chattanooga Elec. R. Co.* 101 Tenn. 252; 47 S. W. Rep. 415. But not if secured by unfair means. *Price v. Richmond, etc., R. Co.* 38 S. C. 199; 17 S. E. Rep. 732; *Missouri, etc., Co. v. Brantley*, 26 Tex. Civ. App. 11; 62 S. W. Rep. 94; *Thompson v. Ft. Worth, etc., R. Co.* 97 Tex. 590; 80 S. W. Rep. 990; *Blount v. Gulf, etc., R. Co.* (Tex. Civ. App.) 82 S. W. Rep. 305.

The bringing of a suit by the deceased, undetermined at his death, is no bar to the administrator's suit. *International, etc., R. Co. v. Kuehn*, 70 Tex. 582; 8 S. W. Rep. 484; *Indianapolis, etc., R. Co. v. Stout*, 53 Ind. 143.

Evidence of the payment of the expenses of the deceased's sickness and of his funeral expenses is not admissible in evidence. *Murray v. Usher*, 117 N. Y. 542; 23 N. E. Rep. 564; 46 Hun, 404.

<sup>12</sup> *Henchey v. City of Chicago*, 41 Ill. 136; *Hartigan v. Southern Pac. R. Co.* 86 Cal. 142; 24 Pac. Rep. 851; *Foot v. Great Northern R. Co.* 81 Minn. 493; 84 N. W. Rep. 342; 52 L. R. A. 354; *Baltimore, etc., R. Co. v. Holtman*, 25 Ohio C. C. 140.

<sup>13</sup> *Pittsburg, etc., R. Co. v. Gipe*, 160 Ind. 360; 65 N. E. Rep. 1034.

Order is not necessary. *Foot v. Great Northern R. Co.* *supra*. A fraudulent release held void. *Pisane v. Shanley*, 66 N. J. L. 1; 48 Atl. Rep. 618. Before appointment, is valid. *Sluber v. MeEntee*, 142 N. Y. 200; 47 N. Y. App. Div. 471; 63 N. Y. Supp. 580; affirmed, 164 N. Y. 58; 58 N. E. Rep. 4.

<sup>14</sup> *Yelton v. Evansville, etc., R. Co.* 134 Ind. 414; 33 N. E. Rep. 629; *Cleveland, etc., Ry. Co. v. Osgood*, 36 Ind. App. 34; 73 N. E. Rep. 285; *Dowel v. Burlington, etc., Ry. Co.* 62 Iowa, 629; *Pittsburg, etc., R. Co. v. Moore*, 152 Ind. 345; 53 N. E. 290; 44 L. R. A. 638; *South, etc., R. Co. v. Sullivan*, 59 Ala. 272; *Knoxville, etc., R. Co. v. Acuff*, 92 Tenn. 26; 20 S. W. Rep. 348; *Pittsburg, etc., R. Co. v. Hosea*, 152 Ind. 412; 53 N. E. Rep. 419; *Oyster v. Burlington, etc., R. Co.* 65 Neb. 789; 91 N. W. Rep. 699; 59 L. R. A. 291.

<sup>15</sup> *Chicago, etc., Ry. Co. v. Wy-more*, 40 Neb. 645; 58 N. W. Rep. 1120.

<sup>16</sup> *Prater v. Tennessee, etc., Co.* 105 Tenn. 496; 58 S. W. Rep. 1068; *Small v. Kreech* (Tenn.) 46 S. W. Rep. 1019; *Stephens v. Nashville, etc., R. Co.* 10 Lea, 448; *Schmidt v. Deegan*, 69 Wis. 300; 34 N. W. Rep. 83; *Southern Pac. Co. v. Tomlinson*, 163 U. S. 369; 16 Sup. Ct. Rep. 1171.

## CHAPTER VII.

### IN WHAT COURTS SUIT MAY BE BROUGHT.

#### SECTION.

- 104. Plaintiff may bring suit in Federal court.
- 105. State courts can enforce liability under the Federal statute.
- 106. Removal of case to Federal court.

#### SECTION.

- 107. Pleading.
- 108. Common carriers defined.
- 109. Statute of limitations.
- 109a. Review on error.
- 109b. Statute not retroactive.

§ 104. Plaintiff may bring suit in federal court.—Since the liability is created by a federal statute and an injured employe bases his right of action thereon, there is no serious doubt but what he may bring his action in a federal court regardless of the question of diverse citizenship. Argument upon that question is not necessary to establish it.<sup>1</sup> But the amount demanded must be two thousand dollars or more, or the court will have no jurisdiction of the cause. If the action is between citizens of different states it may be commenced in the district where the defendant is an inhabitant or in the district where the plaintiff resides if service of process can be made there. Such is the general rule. But it should be noted that where the United States Court has jurisdiction of a cause arising under a law of

<sup>1</sup> Senator Culberson: "Without going into this matter at length, I want to invite attention to the extraordinary result that may follow from the passage of this bill unless the amendment which I have proposed be adopted, and that is this: A railway corporation of the state of Texas which may happen to have on its train articles of freight may be sued in the United States courts of Texas

by a citizen of Texas for injuries or death which may result from the operation of such train, on the ground that the cause of action arises under this act of Congress. That is the result of this bill in the view expressed by some that this act will be exclusive of state authority if it shall become a law." 60 Cong. Rec., 1st Sess., p. 4543.

the United States, irrespective of citizenship, the suit can be maintained only in the district where the defendant is an inhabitant.<sup>1\*</sup>

**§ 105. State courts can enforce liability under the federal statute.**—If the facts warrant it, a state court can enforce a liability arising under this Federal Employers' Liability statute. Upon this exact point there is no express adjudication of the Federal Supreme Court; but at least two cases decided in State Supreme Courts have been reviewed by that court upon the Safety Appliance statute with respect to automatic couplers, and the same principle is applicable to the Federal Employers' Liability Act.<sup>2</sup> In the case of the em-

<sup>1\*</sup> A general appearance of the defendant is a waiver of the privilege of being sued in the district of which it is an inhabitant, but the privilege is not waived by a special appearance for the purpose of objecting to the jurisdiction, or by the filing of an answer to the merits after that objection has been overruled. 1 U. S. Comp. Stat. 508 (4 Fed. Stat. Ann. 265).

On this question see the following cases: *Bellaire v. Baltimore, etc.*, Ry. Co. 146 U. S. 119; 13 Sup. Ct. Rep. 16; 36 L. Ed. 910; *Misouri Pac. Ry. Co. v. Fitzgerald*, 160 U. S. 582; 16 Sup. Ct. Rep. 389; 40 L. Ed. 536; *Great, So., etc., Hotel v. Jones*, 177 U. S. 454; 20 Sup. Ct. Rep. 690; 44 L. Ed. 842; *Torrence v. Shedd*, 144 U. S. 530; 12 Sup. Ct. Rep. 726; 36 L. Ed. 528; *Louisville, etc., R. Co. v. Wangelin*, 132 U. S. 603; 10 Sup. Ct. Rep. 203; 33 L. Ed. 474; *Southern Pac. Co. v. Denton*, 146 U. S. 202; 13 Sup. Ct. Rep. 44; 36 L. Ed. 942; *In re Keasbey, etc.*, Co. 160 U. S. 221; 16 Sup. Ct. Rep. 273; 40 L. Ed.

402; *Cincinnati, etc., R. Co. v. Gregg*, 25 Ky. L. Rep. 2329; 80 S. W. Rep. 512; *Chesapeake, etc., R. Co. v. American Exch. Bank*, 92 Va. 495; 23 S. E. Rep. 935; *Fishbeck v. Western U. Tel. Co.* 161 U. S. 96; 16 Sup. Ct. Rep. 506; 40 L. Ed. 630; *United States v. Gayward*, 160 U. S. 493; 16 Sup. Ct. Rep. 371; 40 L. Ed. 508; *Patten v. Chicago, etc., R. Co.* 74 Fed. Rep. 981; *Southern Ry. Co. v. Carson*, 194 U. S. 136; 48 L. Ed. 907; 24 Sup. Ct. Rep. 609; affirming 68 S. C. 55; 46 S. E. Rep. 525.

<sup>2</sup> *St. Louis, etc., Ry. Co. v. Taylor*, 210 U. S. 281; 28 Sup. Ct. Rep. 616; 52 L. Ed. 1061; and *Schlemmer v. Buffalo, etc., Ry. Co.* 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 681; reversing 207 Pa. St. 198; 56 Atl. Rep. 417. A number of cases have been brought upon the Safety Appliance Act in state courts. *Missouri Pac. Ry. Co. v. Brinkmeier* (Kan.) 93 Pac. Rep. 621; *Southern Pac. R. Co. v. Allen* (Tex. Civ. App.), 106 S. W. Rep. 441; *Chicago, etc., Ry. Co. v. State* (Ark.), 111 S.

ployers' liability statute it has been decided that a state court must enforce its provisions and give relief accordingly whenever the pleading and facts involved bring the case within its provisions.<sup>3</sup> In all cases where less than two thousand dollars is involved, the state courts have exclusive jurisdiction. All cases brought in a state court, when appealed to a state court of final jurisdiction are reviewable on a writ of error.

**§ 106. Removal of case to federal court.**—If an action be brought under the statute, by an employe, in a state court, there is no serious doubt about its removal into a federal court. The liability is one given by a federal statute, and the defendant has the right to insist that that liability be determined by the courts of the nation that created it. Nor is the question of citizenship of the defendant involved. Examples under the Safety Appliance Act are here applicable. This question did not escape the attention of members of the senate.<sup>4</sup> Of course, if a

W. Rep. 456; *Cleveland, etc., Ry. Co. v. Curtis*, 134 Ill. App. 565; *Nichols v. Chesapeake, etc., Ry. Co.* 32 Ky. L. Rep. 270; 105 S. W. 481; 32 Ky. L. Rep. 270.

<sup>3</sup> *Mobile, etc., R. Co. v. Bromberg*, 141 Ala. 258; 37 So. Rep. 395; *Kansas City, etc., R. Co. v. Flippo*, 138 Ala. 487; 35 So. Rep. 457. See *Georgia Pac. R. Co. v. Davis*, 92 Ala. 307; 9 So. Rep. 253; 25 Am. St. Rep. 47.

Mr. Borah: "If the state court has jurisdiction in the matter, it could enforce the federal law just the same as if it were a federal court." 60 Cong. Rec., 1st Sess., p. 4537.

Mr. Dolliver: "But I do not hesitate to say that I understand that a citizen of Georgia can bring a suit in the state court of Geor-

gia for the enforcement of his rights under this act, and would remain in the state court of Georgia unless the defendant exercised his right under the judiciary act and transferred the controversy to the federal court." 60 Cong. Rec., 1st Sess., p. 4548.

"If we pass the bill, the suit may be brought in the state courts." *Ibid*, p. 4528.

<sup>4</sup> Senator Clay: "My idea is that if an employee is allowed to sue in the state courts for the purpose of fixing his rights under the proposed law, and should attempt to do so, then the railroad unquestionably would have a right to transfer that case to the federal courts, because the federal law fixes the rule of liability, and a federal law is involved. Un-

plaintiff brings his action under the statute in a state court, he cannot remove the case to a federal court; for by so doing he chooses his form in which to litigate the case; but that will not bar his right to remove the case by a writ of error to the Supreme Court of the United States from a decision construing the statute adversely to him by the highest appellate court of his state. In order, however, to remove the case to a state court the declaration or complaint must disclose the fact that the action arises under the statute. If it does not disclose that fact, then such fact cannot be supplied by the defendant in its petition for a removal, unless perhaps by affidavit the defendant asserts that the allegations to show

doubtedly, therefore, the defendant would have the right to transfer his case to the federal court." 60 Cong. Rec., 1st Sess., p. 4529.

Senator Heyburn: "Mr. President, under the law governing the removal of cases there is not a particle of room for doubt but that any case arising under the provisions of this law involving a jurisdictional amount might be removed to the United States court upon the motion of the party sued, which would be the railroad company, of course, because the bill applies only to common carriers by rail. There is no question about that at all. There are two grounds upon which a case may be removed. One is diverse citizenship, and the other is that it necessarily depends upon the interpretation of a law of Congress or of the Constitution. We have all had too much practice in the removal of cases to federal courts to be in doubt in regard to that question." 60 Cong. Rec., 1st Sess., p. 4537.

Senator Culberson: "But if a citizen of Texas shall sue a rail-

way corporation organized under the laws of Texas, whose line of railway does not even extend beyond the limits of the state, if the act occurred by which the injuries resulted while that train was, though within the limits of Texas, carrying interstate commerce, that Texas corporation, under this bill, may remove the case to the United States court to have it determined there, because not only may it be said that the right of action so far as this law is concerned arises under this act, but it may be that the corporation will declare in its pleadings that its defense rests upon a proper construction of this act of Congress. All I ask the Senate to do at this time is at least to confine the removal of the cases to those other than those between a citizen of a state and a domestic corporation of a state." 60 Cong. Rec., 1st Sess., p. 4543.

The Senate refused to adopt an amendment requiring diverse citizenship before a case could be removed to a federal court. *Ibid*, pp. 4544, 4545.



the action arises under the statute was fraudulently left out in order to retain the jurisdiction of the state court. But it may well be doubted if this can be done. Undoubtedly the better plan for the defendant is to insist that as the declaration or complaint does not disclose that the action arises under the statute then the statute is not involved; but if the evidence discloses that it does arise under the statute,—or if the injury was received by the plaintiff while engaged in interstate commerce within facts requisite to obtain relief under the statute—there is a fatal variance, and the verdict must be for the defendant. The way for the defendant to obtain relief is an appeal through the state's highest court of appeals to the Supreme Court. Of course if the declaration or complaint be amended at any stage of the proceedings the defendant may (and should do so at once before any other step is taken) immediately apply for a removal to the Federal Court.\*\*

§ 107. **Pleading.**—It is not necessary to plead the act in order to show that the action is based upon it; nor is any reference to the provisions of the act necessary. It is sufficient if the complaint show that the defendant and the employe were both engaged in interstate commerce at the time he received his injury; and when that is done the court will measure the plaintiff's right to recover and the defendant's liability for damages by the terms of the statute.<sup>\*</sup> It has been suggested that if the declaration or complaint does not disclose whether the action is based upon the statute or not—or whether it is grounded upon the statute or the general law of negligence—it is demurrable on the ground that no cause of action is stated. But this position is untenable. The question of the jurisdiction of a Federal Court is always present throughout the entire proceedings, except

<sup>\*</sup> See Section 175.

<sup>\*\*</sup> The following cases may be consulted on the question of fraudulent jurisdiction: *Wecker v. National, etc., Co.* 204 U. S.

176; 51 L. Ed. 430; 27 Sup. Ct. Rep. 184; *Alabama, etc., R. Co. v. Thompson*, 200 U. S. 206; — L. Ed. 441; 26 Sup. Ct. Rep. 161.

where there has been a waiver over the person. It may be presented at any time. While its jurisdiction is general in one sense of the word, in another it is limited. The true rule is that one that solves the difficulties involved, that if the declaration or complaint does not disclose the action is based or grounded upon the statute, then the plaintiff is not seeking to recover for an injury received while engaged in the interstate traffic of the defendant and the sufficiency of his pleading must be measured by the general state law, the provisions of the statute not being involved. However, if the evidence discloses the case is one under the statute there will be a fatal variance and the plaintiff must fail.

**§ 108. Common carriers defined—Receivers.**—The statute applies to “every common carrier by railroad while engaging in” interstate commerce and in the territories. The statute also provides that: “The term ‘common carrier’ as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.”

**§ 109. Statute of limitations.**—“No action shall be maintained under this act unless it commenced within two years from the day the cause of action accrued.”<sup>6</sup> At what time “the cause of action accrued” is the turning point under this section. So far as the employe is personally concerned, there is no difficulty; for his cause of action accrues on the day he is injured. The difficult question is when he dies from his injuries,—when does the right of action in the administrator accrue? Clearly, at least, at the death of the employe. But did not it accrue before that time,—at the date of the injury? The weight of authority is that the administrator’s right of action is a new and independent cause of action, and therefore, his cause of action did not accrue until the death of the injured employe.<sup>9</sup>

<sup>6</sup>Sec. 7 of the Act.

<sup>9</sup>Sec. 6 of Act.

§109a. **Review on error.**—If the action be brought in the United States Circuit Court, any judgment rendered therein may be reviewed in the Circuit Court of Appeals on a writ of error as in ordinary cases; and from the Court of Appeals the case may be taken on a writ of error to the Supreme Court of the United States, where the jurisdiction of the Federal Court is not entirely dependant upon diverse citizenship; and in other cases a writ of *certiorari* when especially allowed by the Supreme Court. If the constitutionality of the statute be involved, then a writ of error direct from the Federal Supreme Court to the United States Circuit Court of the district which rendered the judgment lies, no matter how decided, or where a state law upon the subject is claimed to be in contravention of the Federal Constitution or the Federal Act in question, or where the jurisdiction of the Federal Court is drawn in question. If the action is prosecuted in a state court then the judgment may be reviewed by the Supreme Court on a writ of error issued by it to the court of last resort in the state in the following instances: (1.) Where each court of last resort holds the Act invalid. (2.) Where such court holds a state statute valid which the plaintiff has relied upon, but which the defendant has attacked on the ground that it contravenes the Federal constitution. (3.) Where the judgment of such court is adverse to a right, privilege or immunity specially set up and claimed by either plaintiff or defendant under the Federal constitution or Federal law. (a) An example in the first instance would be where the plaintiff has relied upon the Federal Act in question and the defendant has not removed the case to the Federal Court, but has contested its validity in the state court. (b) An example under the second instance is where the plaintiff seeks to recover under a state statute which the defendant claims to be superseded by the Federal Act in question and where the court holds the State Act is not superseded by such Federal Act and allows a recovery under the state law. (c) An example in the third instance is where an immunity from liability has been set up under the Fifth or Seventh

Amendments to the Federal Constitution and the state court has sanctioned the validity of the Federal Act; or where the defendant has specially set up and claimed a right or immunity under such Federal Act and that right or immunity has been denied by the state court. The burden is upon the party desiring to secure a right to review a state court judgment in the Federal Supreme Court to put clearly upon the record of the state courts the particular right or immunity claimed by him under the Federal Constitution or the Federal Act.<sup>9</sup>

**§ 109b. Statute not retroactive.**—The statute in question is prospective, not retroactive. It does not give a remedy for an injury sustained before its enactment.<sup>10</sup>

<sup>9</sup> See Section 88.

<sup>10</sup> 254 Stat. at Large, 826. The following cases can be consulted: *Osborn v. Detroit*, 32 Fed. Rep. 36; *Eastman v. County of Clackamas*, 32 Fed. Rep. 24; *Humboldt, etc., Co. v. Christopherson*, 73 Fed. Rep. 239; *Wright v. Southern*

*Ry. Co.* 80 Fed. Rep. 260; *Plummer v. Northern Pac. Ry.* 152 Fed. Rep. 206; *Hall v. Chicago, etc., R. Co.* 149 Fed. Rep. 564; *Winfree v. Northern Pac. Ry. Co.* 164 Fed. Rep. 698 (decision on this statute).



the 1990s, the incidence of *S. flexneri* infections in the United Kingdom has increased, and the incidence of *S. flexneri* infection in the United States has increased in the 1980s and 1990s [1, 2].

There is a paucity of data on the epidemiology of *S. flexneri* infection in the United Kingdom. In the 1970s, *S. flexneri* was the most commonly isolated serotype of *Shigella* from patients with shigellosis in the United Kingdom [3]. In the 1980s, *S. flexneri* was the most commonly isolated serotype of *Shigella* from patients with shigellosis in the United Kingdom [4]. In the 1990s, *S. flexneri* was the most commonly isolated serotype of *Shigella* from patients with shigellosis in the United Kingdom [5].

The purpose of this study was to determine the epidemiology of *S. flexneri* infection in the United Kingdom. We determined the serotypes of *S. flexneri* isolated from patients with shigellosis in the United Kingdom, and we determined the risk factors for *S. flexneri* infection in the United Kingdom.

## METHODS

### Study area

The study was conducted in the United Kingdom. The United Kingdom is a country in Europe, and it is the largest country in Europe. The United Kingdom is a country in Europe, and it is the largest country in Europe.

### Study population and study design

The study population consisted of patients with shigellosis in the United Kingdom. The study design was a case-control study. The cases were patients with shigellosis in the United Kingdom. The controls were patients without shigellosis in the United Kingdom. The study was conducted in the United Kingdom.

### Study variables

The study variables were the serotypes of *S. flexneri* isolated from patients with shigellosis in the United Kingdom, and the risk factors for *S. flexneri* infection in the United Kingdom.



the 1990s, the number of people in the world who are undernourished has increased from 600 million to 800 million. The number of people who are malnourished has increased from 1.1 billion to 1.5 billion. The number of people who are obese has increased from 100 million to 300 million. The number of people who are overweight has increased from 200 million to 500 million.

The World Health Organization (WHO) estimates that 1.1 billion people in the world are undernourished. The WHO also estimates that 1.5 billion people in the world are malnourished. The WHO also estimates that 300 million people in the world are obese. The WHO also estimates that 500 million people in the world are overweight.

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## **PART II.**

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### **Safety Appliance Acts.**

petent, I think, for Congress to require uniformity in the construction of cars used in interstate commerce and the use of improved safety appliances upon such trains. Time will be necessary to make the needed changes, but an earnest and intelligent beginning should be made at once. It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subject to a peril of life and limb as great as that of a soldier in time of war."<sup>1</sup> In his annual message of December 1, 1890, President Harrison again said: "It may still be possible for this Congress to inaugurate, by suitable legislation, a movement looking to uniformity and increased safety in the use of couplers and brakes upon freight trains engaged in interstate commerce. The chief difficulty in the way is to secure agreement as to the best appliances, simplicity, effectiveness and cost being considered. This difficulty will only yield to legislation, which should be based upon full inquiry and impartial tests. The purpose should be to secure the co-operation of all well disposed managers and owners; but the fearful fact that every year's delay involves the sacrifice of two thousand lives and the maiming of twenty thousand young men should plead both with Congress and the managers against any needless delay."<sup>2</sup> In his annual message of December 9, 1891, he again said: "I have twice before urgently called the attention of Congress to the necessity of legislation for the protection of the lives of railroad employes, but nothing has yet been done. During the year ending June 30, 1890, 369 brakemen were killed and 7,841 maimed while engaged in coupling cars. The total number of railroad employes killed during the year was 2,451, and the number injured 22,390. This is a cruel and largely needless sacrifice. The government is spending nearly \$1,000,000 annually to save the lives of shipwrecked seamen; every steam vessel is rigidly inspected and required to adopt the most approved safety appliances. All this is good. But how shall

<sup>1</sup> Messages and Papers of Presidents, Vol. 9, p. 51.

<sup>2</sup> Messages and Papers of Presidents, Vol. 9, p. 126.

we excuse the lack of interest and effort in behalf of this army of brave young men who in our land commerce are sacrificed every year by the continued use of antiquated and dangerous appliances? A law requiring of every railroad engaged in interstate commerce the equipment each year of a given per cent. of its freight cars with automatic couplers and air brakes would compel an agreement between the roads as to the kind of brakes and couplers to be used, and would very soon and very greatly reduce the present fearful death rate among railroad employees." <sup>3</sup> In his final annual message of December 5, 1892, he again alluded to the subject as follows: "In renewing the recommendation which I have made in three preceding annual messages that Congress should legislate for the protection of railroad employes against the dangers incident to the old and inadequate methods of braking and coupling which are still in use upon freight trains, I do so with the hope that this Congress may take action upon the subject. Statistics furnished by the Interstate Commerce Commission show that during the year ending June 30, 1891, there were forty-seven styles of car couplers reported to be in use, and that during the same period there were 2,660 employes killed and 26,140 injured. Nearly sixteen per cent. of the deaths occurred in the coupling and uncoupling of cars and over thirty-six per cent. of the injuries had the same origin." <sup>4</sup> As a result of these messages, President Harrison, on March 2, 1893, two days before the expiration of his term of office, had the satisfaction of realizing the fruition of his recommendations and endeavors, and in signing the present Safety Appliance Act. On April 1, 1896, Section 6

<sup>3</sup> Messages and Papers of the Presidents, Vol. 9, p. 208.

<sup>4</sup> Messages and Papers of the Presidents, Vol. 9, p. 331. See also Senate Report of the First Session of the 52nd Congress (No. 1049) and the House Report of the same session (No. 1678), setting out the numerous and increasing casualties due to coup-

ling, the demand for protection, and the necessity of automatic couplers coupling interchangeably. *Johnson v. Southern Pacific Co.* 196 U. S. 1; 25 Sup. Ct. Rep. 158. For debates in Congress on the Safety Appliance Act, see 24 Cong. Rec., pt. 2, pp. 1246, 1273, *et seq.*

of the act was amended; and on March 2, 1903, a supplementary act was adopted.<sup>5</sup>

**§ 111. Resolutions of American Railway Association.**—On June 6, 1893, the American Railway Association, pursuant to the provisions of Section 5, adopted and certified to the Interstate Commerce Commission the following resolutions, viz: (1) “*Resolved*, That the standard height of draw bars for freight cars, measured perpendicular from the level of the tops of the rails to the center of the draw bars, for standard gauge railroads in the United States, shall be thirty-four and one-half inches, and the maximum variation from such standard heights to be allowed between the draw bars of empty and loaded cars shall be three inches.” (2) *Resolved*, That the standard height of draw bars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the draw bars, for the narrow gauge railroads in the United States, shall be twenty-six inches, and the maximum variation from such standard height to be allowed between the draw bars of empty and loaded cars shall be three inches.”<sup>6</sup>

**§ 112. Object of statute—Construction.**—It is clear that the intention of Congress in the passage of the Safety Appliance Act was to, in a measure secure the safety of employes of railroads in moving cars in interstate commerce.<sup>7</sup> “Obviously the purpose of this statute is the protection of the lives and limbs of men, and such statutes,

<sup>5</sup>The act provided that automatic couplers should be used on and after January 1, 1898, but the Interstate Commerce Commission extended the time two years, and subsequently seven months longer. *Johnson v. Southern Pacific Co.*, *supra*.

<sup>6</sup>Interstate Commerce Report, 1893, pp. 74, 263. St. Louis, etc., *Ry. Co. v. Taylor*, 210 U. S.

281, 286; 28 Sup. Ct. Rep. 616; 52 L. Ed. 1061; S. C. 74 Ark. 445; 78 S. W. Rep. 220; 83 Ark. 591; 98 S. W. Rep. 959.

<sup>7</sup>*United States v. Southern Pacific Co.* 154 Fed. Rep. 897; *Crawford v. New York, etc., R. Co.* 10 Amer. Neg. Rep. 166; *United States v. Southern Ry. Co.* 135 Fed. Rep. 122.

when the words fairly permit, are so construed as to prevent the mischief and advance the remedy." <sup>8</sup>

§ 113. **Constitutionality of statute.**—There is no serious question concerning the constitutionality of the Safety Appliance Act. It has been expressly held to be constitutional.<sup>9</sup> In passing upon the Federal Employers' Liability Act in the Supreme Court of the United States, the court refers to two cases <sup>10</sup> as settling the question of the validity of the Safety Appliance Act.<sup>11</sup> In still another case in the United States

<sup>8</sup> Chicago, etc., R. Co. v. Voelker, 129 Fed. Rep. 522; 65 C. C. A. 65; 70 L. R. A. 264; Schlemmer v. Buffalo, etc., R. Co. 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 681; reversing 207 Pa. St. 398; 56 Atl. 417; Atlantic Coast Line R. Co. v. United States, 167 Fed. Rep. — (decided March 1, 1909); Chicago, etc., Ry. Co. v. King, 167 Fed. Rep. — (decided February 3, 1909); Wabash R. Co. v. United States, 167 Fed. Rep. — (decided February 3, 1909).

"I do not know whether statistics are obtainable as to whether the judgments obtained against and expense incurred by the companies were greater than those incurred in putting on the automatic coupler. But aside from all that, an undoubted purpose of Congress was humanitarian. The purpose was to end the maiming and killing of the vast army of men engaged in railroad work. And that the results have been good one now needs but look at the court dockets and the men newer in the railroad service and read the statistics of the past few years." United States v. Chicago, etc., Ry. Co. 149 Fed. Rep. 486.

<sup>9</sup> United States v. Atlantic, etc., R. Co. 153 Fed. Rep. 918; Philadelphia, etc., R. Co. v. Winkler, 4 Pennewill (Del.), 387; 56 Atl. Rep. 112; affirmed, 4 Del. 80; 53 Atl. Rep. 90; Spain v. St. Louis, etc., R. Co. 151 Fed. Rep. 522; Plummer v. Northern Pac. Ry. 152 Fed. Rep. 206; St. Louis, etc., Ry. Co. v. Taylor, 210 U. S. 281; 28 Sup. Ct. Rep. 616; 52 L. Ed. 1061; S. C. 74 Ark. 445; 78 S. W. Rep. 220; 83 Ark. 591; 98 S. W. Rep. 959; Union Bridge Co. v. United States, 204 U. S. 364; Britfield v. Stannah, 192 U. S. 470; Kansas City, etc., R. Co. v. Flipppo, 138 Ala. 487; 35 So. Rep. 457; United States v. Chicago, etc., Ry. Co. 149 Fed. Rep. 486; United States v. Great Northern Ry. Co. 145 Fed. Rep. 438.

<sup>10</sup> Johnson v. Southern Pac. Co. 196 U. S. 1; 25 Sup. Ct. Rep. 158; 49 L. Ed. 363; reversing 54 C. C. A. 508; 117 Fed. Rep. 462; and Schlemmer v. Buffalo, etc., R. Co. 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 681; reversing 207 Pa. St. 198; 56 Atl. Rep. 417.

<sup>11</sup> Employee's Liability Act, 207 U. S. 463; 28 Sup. Ct. Rep. 143; 52 L. Ed. 297.

Supreme Court the question of the validity of the statute was practically settled.<sup>12</sup>

§ 114. **Interpretation of statute.**—The statute is to be construed liberally, as it were, for the protection of the employe. It requires of the railroad company a strict compliance with its terms. It was enacted for the preservation of the life and limbs of the employe, and to place upon the employer, so far as possible, the burden of the loss the employe has sustained by reason of his employer having failed to comply with the requirements of the statute in the construction or car couplers.<sup>13</sup> In a suit by the United States against a railroad to recover a penalty, it has been held that the action is a criminal one and the same interpretation should be applied to the statute as is applied to the usual penal statute.<sup>14</sup> On the other hand, in a suit by the United States, it is said: "This act of Congress is a remedial statute, and it is the duty of the court to so construe its provisions as to accomplish the intent of Congress—to protect the lives and limbs of men engaged in interstate commerce."<sup>15</sup> "The primary object of the act," said Chief Justice Fuller, "was to promote the public welfare by securing the safety of employes and travelers, and it was in that aspect remedial, while for violation a penalty of one

<sup>12</sup> *St. Louis, etc., R. Co. v. Taylor*, 210 U. S. 281; 28 Sup. Ct. Rep. 616; 52 L. Ed. 1061.

<sup>13</sup> *Plummer v. Northern Pac. Ry.* 152 Fed. Rep. 206; *United States v. Atlantic, etc., R. Co.*, 153 Fed. Rep. 918; *Chicago, etc., R. Co.* 167 Fed. Rep. — (decided February 3, 1909); *Wabash R. Co. v. United States*, 167 Fed. Rep. — (decided February 3, 1909); see *St. Louis, etc., Ry. Co. v. Taylor*, 210 U. S. 281; 28 Sup. Ct. Rep. 616; 52 L. Ed. 1061; S. C. 74 Ark. 445; 78 S. W. 220; 83 Ark. 591; 98 S. W.

Rep. 959; *Schlemmer v. Buffalo, etc., R. Co.* 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 681; reversing 207 Pa. St. 198; 56 Atl. Rep. 417; *United States v. El Paso, etc., R. Co.* reported in Appendix; *United States v. Southern Ry. Co.* 135 Fed. Rep. 122; *United States v. Chicago, etc., R. Co.* 149 Fed. Rep. 486; *United States v. Great Northern Ry. Co.* 150 Fed. Rep. 229.

<sup>14</sup> *United States v. Illinois Cent. R. Co.* 156 Fed. Rep. 182.

<sup>15</sup> *United States v. Central of Ga. Ry.* 157 Fed. Rep. 893.

hundred dollars, recoverable in a civil action, was provided for, and in that aspect was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs, that rule not requiring absolute strictness of construction." <sup>16</sup>

<sup>16</sup> *Johnson v. Southern Pac. Ry. Co.* 196 U. S. 1; 25 Sup. Ct. Rep. 158; reversing 54 C. C. A. 508; 117 Fed. Rep. 462; *United States v. Colorado, etc.*, R. Co. 157 Fed. Rep. 321; *Chicago, etc.*, R. Co. v. *King*, 167 Fed. Rep. — (decided February 3, 1909); *Wabash Ry. Co. v. United States*, 167 Fed. Rep. — (decided February 3, 1909); *Atlantic, etc.*, R. Co. v.

*United States*, 167 Fed. Rep. — (decided March 1, 1909).

"The act of Congress is a remedial statute, and it is the duty of the court to so construe its provisions as to accomplish the intent of Congress—to protect the lives and limbs of men engaged in interstate commerce." *United States v. Central of Ga. Ry. Co.* 157 Fed. Rep. 893.



## CHAPTER IX.

### USE IN INTERSTATE TRAFFIC.

#### SECTION.

- 115. What is interstate commerce—Test.
- 116. What is interstate commerce.
- 117. Interterritorial commerce—Act of 1903.
- 118. Use of car forbidden.
- 119. Inhibition of statute—Car employed in interstate traffic.
- 120. Car in use, what is.
- 121. Hauling or using car not loaded with interstate traffic in interstate train.
- 122. Transportation of articles of interstate commerce for an independent express company.
- 123. Distance defective car hauled.
- 124. Switching car.
- 125. Belt railroad — Terminal road.

#### SECTION.

- 126. Car on spur track.
- 127. Used in moving interstate traffic—Sending car to repair shop—Making up train.
- 128. Car not used in interstate commerce.
- 129. Temporary suspension of transportation.
- 130. Permitting cars to be hauled over its line.
- 131. Freight designed for another state—Not yet left the first state.
- 132. Intrastate traffic—Narrow gauge railroad wholly within state.
- 133. Intrastate railroad engaged in carrying interstate commerce articles.
- 134. United States against Geddes denied.
- 135. Burden—Reasonable doubt.

§ 115. What is interstate commerce—Test.—“Importation into one state from another,” said Judge Sanborn, “is the indispensable element in the test of interstate commerce. Every part of every transportation of articles of commerce in a continuous passage from an inception in one state to a prescribed destination in another is a transaction of interstate commerce. Goods so carried never cease to be articles of interstate commerce from the time they are started upon their passage in one state until their delivery at their destination in the other is completed, and they there mingle with and be-

come a part of the great mass of property within the latter state. Their transportation never ceases to be a transaction of interstate commerce from its inception in one state until the delivery of the goods at their prescribed destination in the other, and every one who participates in it, who carries the goods through any part of their continued passage, unavoidably engages in interstate commerce."<sup>1</sup>

§ 116. **What is interstate commerce.**—In discussing the question of interstate commerce and what it is, the Supreme Court of the United States used the following language, which has been applied in the construction of the Safety Appliance Act: "In this case it is admitted that the steamer was engaged in shipping and transporting down Grand river goods destined and marked for other states than Michigan, and in receiving and transporting up the river goods brought within the state from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the state, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other states, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So

<sup>1</sup> *United States v. Colorado, etc.*, R. Co. 157 Fed. Rep. 321; citing *Rhodes v. Iowa*, 170 U. S. 412; 18 Sup. Ct. Rep. 664; 42 L. Ed. 1088; reversing 90 Iowa, 496; 58 N. W. Rep. 887; 21 L. R. A. 245; *Kelley v. Rhoades*, 188 U. S. 1; 23 Sup. Ct. Rep. 259; 47 L. Ed. 359; reversing 9 Wyo. 352; 87 Am. St. Rep. 959; 63 Pac. Rep. 935; *Houston, etc., Co. v. Ins. Co.* 89 Tex. 1; 32 S. W. Rep. 889; 30 L. R. A. 713; 53 Am. St. Rep. 17; *Leisy v. Hardin*, 135 U. S. 100; 10 Sup. Ct. Rep. 681; 34 L. Ed. 128; reversing 78 Iowa, 286; 43 N. W. 188; *Lyng v. Michigan*, 135 U. S. 161; 10 Sup. Ct. Rep. 725; 34 L. Ed. 150; re-

versing 74 Mich. 579; 42 N. W. Rep. 139; *Caldwell v. North Carolina*, 187 U. S. 622; 23 Sup. Ct. Rep. 229; 47 L. Ed. 336; reversing 127 N. C. 521; 37 S. E. Rep. 138.

The act approved March 2, 1903, is not unconstitutional, and the *Employers' Liability Cases*, 207 U. S. 463; 28 Sup. Ct. Rep. 143; 52 L. Ed. 297, is not in point; for the statute then under consideration applied to the individuals or corporations engaged in interstate commerce, whereas the *Automatic-Safety Appliance Act* is addressed alone to an instrument of interstate commerce, viz., an interstate railroad. *United States v. Southern Ry. Co.* 164 Fed. Rep. 347.

far as she was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan and destined to places within that state, she was engaged in commerce between the states, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce, for whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress. It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a state; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a state on which grain or fruit is transported to a distant market. We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the states, when that agency extends through two or more states, and when it is confined in its action entirely within the limits of a single state. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a state, and leaving it at the boundary line at the other end, the federal jurisdiction would

be entirely ousted, and the constitutional provision would become a dead letter."<sup>2</sup>

**§ 117. Interterritorial commerce—Act of 1903.**—The inter-territorial commerce designated in the Act of 1903 is equivalent to the interstate commerce under the Act of 1893. In an action for a violation of the statute in a territory the complaint will not be defective for a failure to allege that the defendant is a common carrier engaged in interstate commerce, if it alleges that the defendant is a common carrier engaged in commerce by railroad among the several territories of the United States, particularly the territories of Arizona and New Mexico.<sup>3</sup>

**§ 118. Use of car forbidden.**—In the first section of the statute it is declared that "it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine" not equipped with a driving-wheel brake; and in the sixth section, as amended in 1896, it is provided, "That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of the provisions" of the act shall be liable to a

<sup>2</sup>The *Daniel Ball*, 10 Wall. 557, 19 L. Ed. 999, reversing *Brown*, Admr., Cas. 193; Fed. Cas. No. 3,564, used in *United States v. Colorado*, etc., Ry. Co. 157 Fed. Rep. 321; *Elgin*, etc., R. Co. v. *United States*, 167 Fed. Rep. (decided February 3, 1909).

A car billed on defendant's line of railroad in Illinois to a destination in Missouri is a car used in moving interstate traffic, although the defendant does not haul the car from one state to another. *United States v. Southern Ry. Co.* 135 Fed. Rep. 122.

No system can be devised to turn interstate commerce into in-

terstate commerce. *United States v. Chicago*, etc., R. Co. 149 Fed. Rep. 486.

Where a car is loaded in one state with a commodity destined for another state, and begins to move, then interstate commerce has begun and does not cease until the car has arrived at its point of final destination. *United States v. Atlantic Coast Line R. Co.* 167 Fed. Rep. — (decided February 24, 1909); Appendix G, p. 372.

<sup>3</sup>*United States v. El Paso*, etc., R. Co. Pamphlet of Interstate Commerce Commission, 1907, p. 143. See Appendix G, 274, 279, for this case.

penalty. Section second provides that "it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." By reason of the language of this statute it is clear that it is only the use of insufficiently equipped cars that is forbidden; and, of course, the hauling of the car is a use. The ownership of the car is immaterial.<sup>4</sup> It is not the mere fact of the ownership of a car, defectively, or not at all, equipped even though there be an intent to use or haul it, that constitutes the offense against the statute; but the offense against or violation of the statute is its actual use or hauling it. "The act of 1893 makes it unlawful for a company to do certain things: *First*, to haul the car. *Second*, to permit the car to be hauled. *Third*, to use or permit a car to be used. All three of these prohibitions are with reference to cars on the lines of the company within this judicial district. And the prohibitions are with reference to cars used only in interstate traffic and which are not equipped with couplers coupling automatically by impact and which cars can be coupled without the necessity of men going between the ends of the cars."<sup>5</sup> It is immaterial what is the purpose of the movement of the car nor the distance it is hauled, nor whose car it is. If the car is defective the railroad company is liable.<sup>6</sup>

<sup>4</sup> Crawford v. New York, etc., R. Co. 10 Am. & Eng. R. Cas. 166; United States v. Chicago, etc., R. Co. 143 Fed. Rep. 353; United States v. Chicago, etc., Ry. Co. 149 Fed. Rep. 486.

<sup>5</sup> United States v. Chicago, etc., Ry. Co. 149 Fed. Rep. 486; United States v. Northern Pac. T. Co. 144 Fed. Rep. 861. Elgin, etc., R. Co. v. United States, 167 Fed. Rep. (decided February 3, 1909);

Chicago, etc., R. Co. v. United States, 167 Fed. Rep. — (decided March 10, 1909).

<sup>6</sup> United States v. Northern Pac. T. Co. 144 Fed. Rep. 861; United States v. Chicago, etc., R. Co. 143 Fed. Rep. 353; United States v. Southern Ry. Co. 135 Fed. Rep. 122; Crawford v. New York, etc., R. Co. 10 Am. & Eng. R. Cas. 166. If the car is one that is regularly used in the move-

§ 119. **Inhibition of statute—Car employed in interstate traffic.**—"The statute was designed to inhibit the hauling or using by any railroad company in its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, etc., the denouncement being against the use of the car. It makes but little difference, therefore, whether the car contained at the time any commodity being carried as freight or not, if the car was one being used in moving interstate traffic, not in the sense that at the particular time it was going, loaded or partially so with a commodity being shipped from one state into another or others, but that it was being employed in a service that was moving interstate traffic." A car loaded with coal, to be delivered to a consignee in another state, is used "in moving interstate traffic," if hauled by a railroad company in taking it from the place of loading, although such com-

ment of interstate traffic, and is at the time involved in the movement of a train containing interstate traffic, the lading of the car is wholly immaterial. *United States v. Wheeling* (see Appendix G).

*United States v. Northern, etc., Ry. Co.* 144 Fed. Rep. 861. In this case the court adds: "Such is the construction given the law by Shiras, district judge in *Voelker v. Chicago, etc., Ry. Co.* 116 Fed. Rep. 867, and affirmed by Mr. Chief Justice Fuller in *Johnson v. Southern Pac. Co.* 196 U. S. 1; 25 Sup. Ct. Rep. 158; 49 L. Ed. 363; reversing 54 C. C. A. 508; 117 Fed. Rep. 462. "The words 'used in moving interstate traffic' should not be taken in a narrow sense." *Schlemmer v. Buffalo, etc., R. Co.* 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 681; reversing 207 Pa. St. 198; 56 Atl. Rep. 417; *United States v. Chicago, etc., Ry. Co.* 143 Fed. Rep. 373.

"The railway locomotive, train, or car, or the car as a constituent of the train, that goes from State to State carrying wholly, or in part, any interstate commerce are for the time being instrumentalities of interstate commerce; as also the locomotive train, or car that, though not going out of the State, carries on its way through the State traffic that is interstate transit; and the obverse of that would seem to be that a train traveling wholly between points in the same State, and not going out of the State, and carrying wholly commerce originating in the State, destined to points in the same State, is not for the time being an instrument of interstate commerce." *Elgin, etc., R. Co. v. United States*, 167 Fed. Rep. (decided February 3, 1909); *Wabash, etc., R. Co. v. United States*, 167 Fed. Rep. — (decided February 3, 1909).

pany only undertakes to deliver it to a connecting carrier within the same state.<sup>8</sup> And this is true, although it only hauls it through its own yards.<sup>9</sup> A railroad company hauling its own rails from one state to another, to be there used by it, is engaged in interstate commerce.<sup>10</sup> But it has been held that coal mined in Kentucky and there loaded, and then billed and shipped to another place in the same state, is not turned into interstate commerce by the fact that in its route it passed through a part of another state.<sup>11</sup>

**§ 120. Car in use, what is—**A loaded car from another state, not yet delivered to the consignee at the time of its stoppage in a railroad yard at its destination and shunted on a side track for repairs to its coupler which had become defective, is still a car used in interstate commerce. "Its stoppage in the yard was an incident to the transportation. The injury to the coupler was one easily repaired without being taken to a repair shop, and the car was being hauled upon the track when the accident occurred."<sup>12</sup>

<sup>8</sup> *United States v. Southern Ry. Co.* 135 Fed. Rep. 122.

<sup>9</sup> *United States v. Pittsburg, etc., R. Co.* 143 Fed. Rep. 360; *contra*, *McCutcheon v. Atlantic, etc., R. Co. (S. C.)* 61 S. E. Rep. 1108. But hauling empty intrastate cars in an interstate train is within the statute. *Elgin, etc., R. Co. v. United States*, 167 Fed. Rep. (decided February 3, 1909); *Chicago, etc., R. Co. v. United States*, 167 Fed. Rep. — (decided March 10, 1909).

<sup>10</sup> *United States v. Chicago, etc., R. Co.* 149 Fed. Rep. 486.

So it is a violation of the statute for a company to haul sand for itself in improperly equipped cars, from one state to another. *United States v. Southern R. Co.* Appendix G, p. 367.

<sup>11</sup> *Louisville, etc., R. Co. v. Vancleave*, 23 Ky. L. Rep. 479; 63 S. W. Rep. 22; *Louisville, etc., R. Co. v. Walker*, 23 Ky. L. Rep. 453; 63 S. W. Rep. 20. But the United States Court held it is interstate commerce. *United States v. Erie R. Co.* 166 Fed. Rep. 352. See *Hanley v. Kansas City So. Ry. Co.* 187 U. S. 618; 23 Sup. Ct. Rep. 214; 47 L. Ed. 333; affirming 106 Fed. Rep. 353.

<sup>12</sup> *St. Louis, etc., R. Co. v. Delk*, 158 Fed. Rep. 931; citing *Johnson v. Southern Pac. Co.* 196 U. S. 1; 25 Sup. Ct. Rep. 158; 49 L. Ed. 363; reversing 54 C. C. A. 508; 117 Fed. Rep. 462; *Chicago, etc., R. Co. v. Voelker*, 129 Fed. Rep. 522; 65 C. C. A. 226; 70 L. R. A. 264.

In order to constitute a viola-

**§ 121. Hauling or using car not loaded with interstate traffic in interstate train.**—The statute covers an instance of using or hauling in an interstate train a car not loaded with interstate traffic nor hauled from one state to another. The statute, as amended in 1896,<sup>13</sup> prohibits the “hauling or permitting to be hauled or used on its line, any car in violation” of the Safety Appliance Act. “The older statute was with reference only to cars used in moving interstate traffic regardless of whether it was a local road or one extending into several cases. The reported cases, and the reports of the Interstate Commerce Commission, show that it was often difficult to prove in what traffic, local or interstate, the car was being used, and without such evidence neither state nor national prosecution could be carried on. And to cure that defect, the latter statute covers all cars used on any railroad engaged in interstate traffic regardless of whether the particular car was for local or interstate use.”<sup>14</sup>

**§ 122. Transportation of articles of interstate commerce for an independent express company.**—If a railroad company, even though it has its lines wholly within the boundaries of a single state, accept and transport articles of

tion of the Safety Appliance Act, the car must be moved in a defective condition. *United States v. Lehigh Valley R. Co.* 162 Fed. Rep. 410 (see Appendix G); *United States v. Philadelphia, etc., R. Co.* 162 Fed. Rep. 405 (see Appendix G, p. 315); *United States v. Pennsylvania R. Co.* 162 Fed. Rep. 408 (see Appendix G, p. 321); *United States v. Philadelphia, etc., R. Co.* 160 Fed. Rep. 696; 162 Fed. Rep. 403.

Judge Lurton dissented, distinguishing the case from the *Johnson* case, and *Railway v. Bowles*, 71 Miss. 1003; 15 So. Rep. 138, and *Taylor v. Boston Ry.* 189 Mass. 390; 74 N. E. Rep. 591,

arising under similar state statutes.

<sup>13</sup> Sec. 6 of Act.

<sup>14</sup> *United States v. Chicago, etc., Ry. Co.* 149 Fed. Rep. 486.

Cars hauled from one point in a State to another point in the same State, loaded with intrastate commerce, but in an interstate train, must be equipped with automatic couplers. *Elgin, etc., R. Co. v. United States*, 167 Fed. Rep. (decided February 3, 1909); *United States v. Chicago, etc., R. Co.* 162 Fed. Rep. 775. And so must empty cars hauled in an interstate train. *United States v. Erie R. Co.* 166 Fed. Rep. 352.



interstate commerce for an independent express company,<sup>15</sup> it is engaged in interstate commerce and must equip its cars in the train with automatic couplers to escape the penalty inflicted by the act of Congress. "But although the express company," said Judge Sanborn, "was not one of the common carriers engaged in interstate commerce to which the original interstate commerce act applied,<sup>16</sup> the box of liquor it caused to be transported from Missouri to Colorado was an article of interstate commerce, its carriage was a transaction of that commerce, and the express company's participation in its transportation was engaging in interstate commerce."<sup>17</sup> Moreover, the interstate commerce act had been so amended that express companies were subject to its provisions before the transportation here in issue was conducted.<sup>18</sup> The Safety Appliance Act declares that 'it shall be unlawful for any common carrier engaged in interstate commerce by railroad,'<sup>19</sup> 'to haul or permit to be hauled or used on its line any car' (or engines)<sup>20</sup>—except four-wheeled cars and certain logging cars<sup>21</sup>—'and in moving interstate commerce traffic unequipped with couplers coupling automatically by impact,'<sup>22</sup> and that every such carrier shall be liable to a penalty of one hundred dollars for each violation of the statute. The Northwestern Company<sup>23</sup> transported the box of liquor upon its railroad from Boulder to

<sup>15</sup> Wells, Fargo & Company.

<sup>16</sup> Citing *United States v. Moraman*, 42 Fed. Rep. 448; *Southern Indiana Exp. Co. v. U. S. Exp. Co.* 88 Fed. Rep. 659.

<sup>17</sup> Citing *Crutcher v. Kentucky*, 141 U. S. 47; 11 Sup. Ct. Rep. 851; 35 L. Ed. 649; reversing 89 Ky. 6; 12 S. W. Rep. 141; *Osborne v. Florida*, 164 U. S. 650; 17 Sup. Ct. Rep. 214; 41 L. Ed. 586; affirming 32 Fla. 162; 25 L. R. A. 120; 4 Interst. Com. Rep. 731; 14 So. Rep. 588; 39 Am. St. Rep. 99; *Caluwell v. North Carolina*, 187 U. S. 622; 23 Sup. Ct.

Rep. 229; 47 L. Ed. 336; reversing 127 N. C. 521; 37 S. E. Rep. 138.

<sup>18</sup> Act June 29, 1906, S. 3591, Secs. 1 and 11; 34 Stat. at L. 584, 595.

<sup>19</sup> 27 Stat. at Large, 531, Sec. 1.

<sup>20</sup> Citing *Johnson v. Southern Pac. R. Co.* 196 U. S. 1; 25 Sup. Ct. Rep. 158; 49 L. Ed. 303; reversing 54 C. C. A. 508; 117 Fed. Rep. 462.

<sup>21</sup> Citing Sec. 6 of Act.

<sup>22</sup> Citing Sec. 2 of Act.

<sup>23</sup> The defendant.

Sunset for the express company, on its continuous passage from its origin in one state to its prescribed destination in another, and evidence was rejected upon the trial that it was a daily occurrence for this railroad to carry express matter in its cars which had been consigned from points without to places within the state of Colorado. That rejected evidence should have been received because it had a tendency to show that the railroad company was engaged in interstate commerce, and if the testimony had fulfilled the promise of the question propounded to elicit it, and had been uncontradicted, the fact would have been established that the company was thus engaged within the meaning of the Safety Appliance Act. The transportation by a common carrier by railroads of articles of interstate commerce for an independent express company is engaging in interstate commerce by railroad as effectually as their carriage by it for the vendors or consignors." "Our conclusion is that a common carrier which operates a railroad entirely within a single state and transports thereon articles of commerce shipped in continuous passage from places without the state to stations on its road, or from stations on its road to points without the state, is subject to the provisions of the Safety Appliance Acts, although it carries the property free from a common control, management or arrangement with another carrier for continuous carriages or shipments of the goods." <sup>24</sup>

§ 123. Distance defective car hauled.—It is immaterial how short a distance the defective car is hauled; if hauled at all the railroad company is liable. This is particularly true of terminal railroads. <sup>25</sup>

\* *United States v. Colorado*, etc., R. Co. 157 Fed. Rep. 342.

\* *United States v. Northern Pac. Terminal Co.* 144 Fed. Rep. 861; *United States v. Philadelphia, etc.*, R. Co. 160 Fed. Rep. 696; 162 Fed. Rep. 403.

A movement of a car not exceeding twenty feet, resulting in injuring an employee, was held to be a violation of the statute. *Chicago, etc.*, R. Co. v. King, 167 Fed. Rep. — (decided February 3, 1909); *Donegan v. Baltimore, etc.*, R. Co. 165 Fed. Rep. 869.

§ 124. **Switching car.**—The statute applies to a car while being used in switching movements.<sup>26</sup>

§ 125. **Belt railroad—Terminal road.**—The statute applies to cars hauled on a belt railroad, used as a link between railroads engaged in interstate commerce.<sup>27</sup> So it applies to a terminal road, and to those delivering to and receiving cars from it.<sup>28</sup> “When, therefore, the terminal company is engaged in effecting a transfer of one of those cars from one line of railway to another, it is itself engaged in handling a car used in moving interstate traffic. Thus far there can be absolutely no evil. But what is the difference if it takes the car from one of the lines and moves it to its own team track, there to be unloaded, or moves it back empty and places it in one of the lines again to be forwarded elsewhere? In either event it handles a car used in the designated traffic. So it does with equal fault when it moves a car used for moving interstate traffic set in by one of the lines to a convenient engine upon the yard, to be unloaded of its coal designed for use by such engine. It is

<sup>26</sup> *United States v. Pittsburg, etc.*, R. Co. 143 Fed. Rep. 360; *Crawford v. New York, etc.*, R. Co. 10 Am. & Eng. Neg. Cas. 166; *United States v. Northern Pacific T. Co.* 144 Fed. Rep. 861; *United States v. Pittsburg, etc.*, R. Co. 143 Fed. Rep. 360; *United States v. Chicago, etc.*, Ry. Co. 143 Fed. Rep. 353; *Chicago, etc.*, R. Co. v. *United States*, 165 Fed. Rep. 425. *United States v. Philadelphia, etc.*, Ry. Co. 160 Fed. Rep. 696, and 162 Fed. Rep. 403; *United States v. Lehigh Valley R. Co.* 162 Fed. Rep. 410; *United States v. Philadelphia, etc.*, R. Co. 162 Fed. Rep. 405; *United States v. Pennsylvania R. Co.* 162 Fed. Rep. 408; *Elgin, etc.*, R. Co. v. *United States*, 167 Fed. Rep. (decided February

3, 1909); *Wabash R. Co. v. United States*, 167 Fed. Rep. — (decided February 3 1909); *United States v. Southern Ry. Co.* Appendix G.

<sup>27</sup> *Interstate Stock Yards v. Indianapolis Union Ry. Co.* 99 Fed. Rep. 472; *United States v. Union Stock Yards Co.* 161 Fed. Rep. 919; *Belt Ry. Co. v. United States*; see Appendix G; *Belt Ry. Co. v. United States*, 167 Fed. Rep. — (decided February 3, 1909).

<sup>28</sup> *United States v. Chicago, etc.*, R. Co. 143 Fed. Rep. 353; *United States v. Southern Pac. Co.* 154 Fed. Rep. 897; *United States v. Northern Pac. T. Co.* 144 Fed. Rep. 861.

hauling or using a car, the particular use of which is inhibited by the statute.”<sup>22</sup>

§ 126. **Car on spur track.**—In a case in Alabama the evidence showed that the defendant operated a railroad running between Birmingham of that state and Memphis in the state of Tennessee. The plaintiff was in its employ and service at the time he received his injuries as brakeman, and was injured while in the act of coupling a car to a switch engine on a spur track a mile from the main track, this spur track joining the main track at Carbon Hill, a station of the defendant. At the time of the injury the car was being switched on the spur at a coal mine preparatory to being carried to Carbon Hill by defendant's switch engine in charge of its employes, to be then shipped over its main line. The switch engine never went further than Carbon Hill, and was used for no other purpose than switching, not being used on the main line, but being used merely for carrying cars to the station from the mines, and then placing the cars on a special siding at the station, Carbon Hill, from which they were taken by regular trains to the point of destination. After the car had been loaded at the mines and put on the storage track or special siding at Carbon Hill, it was thereafter billed and shipped from Carbon Hill to Aberdeen, Mississippi, by the company owning the coal mines. Sometimes, also, cars were billed from the mines. There was nothing to show that any instructions whatever had been given by the shipper before the car reached Carbon Hill as

<sup>22</sup> *United States v. Northern Pacific Terminal Co.* 144 Fed. Rep. 861; *Chicago, etc., R. Co. v. United States*, 165 Fed. Rep. 423; *United States v. Union Stock Yards Co.* 161 Fed. Rep. 919; *Belt Ry. Co. v. United States*, see Appendix G.

“It may be questioned whether a railroad company must be a com-

mon carrier in order to bring it within these acts, since the amendment approved March 2, 1903, makes the provisions and requirements of that amendatory act, as well as of the original, apply to all ‘cars and similar vehicles used on any railroad engaged in interstate commerce.’” *United States v. Union, etc., Co.* 161 Fed. Rep. 919.

to its destination or intended destination; but after being placed on the storage track at Carbon Hill it was picked up by a regular train and carried to Aberdeen. So far as the evidence showed, the car at the time of the accident, while still at the mines, might have been intended for shipment by the mine owner to some point within the state. Upon these facts the court refused to disturb the verdict of the jury to the effect that the car was engaged in interstate commerce at the time the defendant was injured by a defective coupling on the car.<sup>30</sup>

§ 127. "Used in moving interstate traffic"—Sending car to repair shop—Making up train.—The phrase "used in moving interstate traffic" does not mean that a car must be actually loaded and on its journey from one state to another in order to be within the provisions of the statute; but only that it has been intended and is intended to be so used whenever required; and it is a violation of the statute to move such a car, if not equipped with automatic brakes, from one state to another as a part of a train, although it is empty at the time; nor is the mere fact that it is destined for a repair shop a defense.<sup>31</sup> The statute applies to making up the train for the purpose of moving interstate traffic.<sup>32</sup> And so it applies to a dining car standing on a side track waiting to be hitched onto its regular train.<sup>33</sup>

<sup>30</sup> *Kansas City, etc., R. Co. v. Flippo*, 138 Ala. 487; 35 So. Rep. 457; *Chicago, etc., R. Co. v. United States*, 165 Fed. Rep. 423.

<sup>31</sup> *United States v. St. Louis, etc., R. Co.* 154 Fed. Rep. 516; *United States v. Great Northern Ry. Co.* 145 Fed. Rep. 438; *Elgin, etc., R. C. v. United States*, 167 Fed. Rep. — (decided February 3, 1909); *United States v. Philadelphia, etc., R. Co.* 160 Fed. Rep. 696; 162 Fed. Rep. 403; *United States v. Pennsylvania R. Co.* 162 Fed. Rep. 408 (see Appendix G, p. 321); *United States v. Philadel-*

*phia, etc., R. Co.* 162 Fed. Rep. 405 (see Appendix G); *United States v. Lehigh Valley R. Co.* 162 Fed. Rep. 410 (see Appendix G); *United States v. Louisville, etc., R. Co.* 162 Fed. Rep. 185. But not under the Massachusetts state statute. *Taylor v. Boston, etc., R. Co.* 188 Mass. 390; 74 N. E. Rep. 50.

<sup>32</sup> *Mobile, etc., R. Co. v. Bromberg*, 141 Ala. 258; 37 So. Rep. 395; *United States v. Northern Pacific T. Co.* 144 Fed. Rep. 861.

<sup>33</sup> *Johnson v. Southern Pac. Ry. Co.* 196 U. S. 1; 25 Sup. Ct. Rep. 158; reversing 117 Fed. Rep. 462;

**§ 128. Car not used in interstate commerce.**—Of course, a car not used in interstate commerce does not come within the provisions of the statute; but if it is hauled in an interstate train of cars it does; because the danger to employes engaged in transportation of interstate traffic—whom it was the design of Congress to protect—is just as imminent as if the car was used in interstate commerce.<sup>54</sup>

**§ 129. Temporary suspension of transportation.**—The temporary suspension of the transportation of a car does not take it out of the statute. "Whether that [the ultimate destination] was nearby or remote is not material, because the shipment had originated in another state and was already impressed with the character of interstate traffic, which would follow it at least until the actual transit ceased."<sup>55</sup>

**§ 130. Permitting cars to be hauled over its lines.**—It is immaterial not only what company owns the cars but it is

<sup>54</sup> C. C. A. 508; Chicago, etc., R. Co. v. United States, 165 Fed. Rep. 423.

<sup>55</sup> Winkler v. Philadelphia etc., R. Co. 4 Penn. (Del.) 387; 53 Atl. Rep. 90; Elgin, etc., R. Co. v. United States, 167 Fed. Rep. — (decided February 3, 1909); United States v. Chicago, etc., R. Co. 162 Fed. Rep. 775.

Congress has no power to regulate the use of cars not employed in interstate commerce, and the Safety Appliance Act cannot be so construed. United States v. Erie R. Co. 166 Fed. Rep. 352.

The statute requires cars used in interstate commerce or cars used in "connection" therewith to be equipped with secure grab irons at the ends and sides of each car for the greater safety of men coupling and uncoupling;

but this statute does not apply to a car used in intrastate commerce only, not so equipped, though moved in a train containing a car bearing interstate commerce where the interstate and intrastate cars are in different parts of the train and not in position to be coupled or uncoupled. In other words, if sufficiently equipped intrastate cars are between the defectively equipped intrastate car and the interstate cars no offense is committed; because such defectively equipped car is not used in "connection" with interstate commerce cars. United States v. Illinois Central R. Co. 166 Fed. Rep. 997.

<sup>56</sup> Chicago, etc., Ry. Co. v. Voelker, 129 Fed. Rep. 522; 65 C. C. A. 65; 70 L. R. A. 264; Chicago, etc., R. Co. v. United States, 165 Fed. Rep. 423.

also immaterial what company hauls so far as the company owning the line over which they are hauled commits an offense. Merely permitting cars improperly equipped to be hauled by another company over its line of railroad is an offense in the company owning the railroad and permitting the hauling to be done. "It does not matter whether the defendant was the owner or not, because the statute prohibits the use on the line of the road or the permitting to be hauled on the line of the road, any of these cars not equipped as the statute provides. So that if they permitted to be hauled or used on their roads any such cars, even though they belonged to other companies, they would offend against this provision of the statute."<sup>26</sup>

**§ 131. Freight designed for another state—Not yet left the first state.**—It matters not that the freight designed for another state has not yet left the state from which it is intended for such other state, if it has been placed aboard the cars ready for transportation to such other state. In one case the following language was used: "It has been proven in this case \* \* \* that both of the cars in question were carrying traffic consigned from a point in one state to a point in another state. This makes such traffic interstate commerce. While the evidence does not show that the defendant hauled the car across the state line, still the defendant is engaged in interstate traffic no matter how short the movement, if the traffic hauled is in course of movement from a point in one state to a point in another."<sup>27</sup>

<sup>26</sup> Crawford v. New York, etc., R. Co. 10 Am. & Eng. Neg. Cas. 166. The receiving company must ascertain at its peril that each car it receives from another railroad company is properly equipped with safety appliances. United States v. Chicago etc., R. Co. 162 Fed. Rep. 775; United States v. Southern Pac. Co. (see Appen-

dix G, p. 343). What is the receipt of a car, see Chicago, etc., R. Co. v. United States, 165 Fed. Rep. 423.

<sup>27</sup> United States v. Central of Ga. Ry. Co. 157 Fed. Rep. 893; United States v. Northern, etc., Ry. Co. 144 Fed. Rep. 861; United States v. St. Louis, etc., R. Co. 154 Fed. Rep. 516.

§ 132. **Intrastate traffic—Narrow gauge railroad wholly within state.**—A company owned and operated a narrow gauge road that lay wholly within the state of Ohio, and was about one hundred miles long, terminating at Bellaire on the Ohio river. At Bellaire it connected with the Baltimore & Ohio Railroad in the sense that it received from that railroad freight from other states marked for points on its line, and delivered to it freight from points on its own line marked for other states in the following manner: There was no interchange of cars because of the different gauges of the two roads, the defendant's cars being used only on its own road. A transfer track ran from its terminal station to the Baltimore and Ohio road, so the freight cars of the two roads could be placed alongside of adjoining platform, and the transfer of freight made from the cars of one road to those of the other. Neither road issued through bills of lading for the freight transferred; and no through rate for freight was fixed by mutual arrangement, nor was there a division of freight charges for through freight carried by both roads. Freight transported to Bellaire by the narrow gauge road and marked for a point in another state was delivered to the agents of the Baltimore and Ohio with an expense or transfer bill that stated the original point of the shipment, the consignee and place of consignment, and the freight charges of the delivering road. The usual way-bills accompanied this traffic. On taking charge of freight thus delivered to it, the Baltimore and Ohio assumed the payment of the narrow gauge road's freight charges, and collected the entire charges of the transportation on delivering the freight at its destination. Incoming freight was handled in the same manner, except that the agents of the Baltimore and Ohio at Bellaire would bring the traffic to and put it in cars of the narrow gauge road. When it received freight with the expense or transfer bill, the narrow gauge road would assume the charges of the other road, and collect the entire freight charges at its destination. There were weekly settlements between the two roads of



freight charges, and balances paid when found due; but each road became responsible for the freight charges of the other, whether the consignee paid them or not. Such transfers occurred daily, and each company's charges were in accordance with its own rates. The acts upon which the suit was based were hauling in a car not equipped as the act of Congress required, cases of eggs destined for a point in Pennsylvania and delivered at Bellaire to the Baltimore and Ohio for shipment to the point of destination; and also the hauling of certain freight in cars not properly equipped from Bellaire to a station over the narrow gauge road, which freight had been shipped from Philadelphia, in Pennsylvania, and consigned to a point on the latter road. It did not appear there was any through bill of lading; but the form of the bill of lading used by the defendant, the narrow gauge road, provided as follows: "This blank must in no case be filled with the name of any station or place beyond the line of this company's road." Upon these facts it was held that the car carrying the eggs and those carrying the freight from Philadelphia were not used in interstate commerce, and so need not be equipped with automatic brakes.<sup>22</sup>

**§ 133. Intrastate railroad engaged in carrying interstate commerce articles.**—This statute has been held to apply to a railroad company operating wholly within a state, independently of all other carriers, but which receives and transports to their destination articles, in a continuous trip, brought from another state. Thus, a narrow gauge railroad was operated wholly within the state of Colorado. A shipment of hardware was carried by an interstate wide gauge railroad from Omaha, Nebraska, to a station on this narrow gauge road and delivered to it for carriage to a station on

<sup>22</sup> United States v. Geddes, 131 Fed. Rep. 452; 65 C. C. A. 320. See also United States v. Chicago, etc., R. Co. 81 Fed. Rep. 783, and Interstate Commerce Commission

v. Bellaire, etc., R. Co. 77 Fed. Rep. 942.

The case of United States v. Geddes, *supra*, is discussed and denied in Sec. 134.

the main line a few miles farther on, to which place it had been consigned from Omaha. This shipment was not carried upon a through bill of lading, but it was consigned and carried upon a continuous passage from the point of origin to its destination at the station of the narrow gauge. The shipment was re-billed by the narrow gauge road from the point it received it to its place of destination on its line, and it advanced the freight charges for the previous transportation, collecting them of the consignee on delivering the goods. The broad gauge and narrow gauge roads, at their point of contact, had a platform for their common use, for the purpose of receiving goods on one side of it and loading on the other, in this way making an exchange of goods carried by them respectively. It was held that this narrow gauge road was subject to the federal statute and must equip its cars with automatic brakes. Judge Sanborn relied upon the celebrated case of *The Daniel Ball*.<sup>99</sup> That was a case to recover a penalty in a suit brought by the United States for navigating Grand river in the state of Michigan without a license. The defense was that the boat was not engaged in trade or commerce between two or more states, but was employed solely in intrastate commerce. It was agreed that the vessel was operated entirely within the state of Michigan between Grand Rapids and Grand Haven, and that it did not run in connection with, or in continuation of, any line of steamers or vessels on the lake, or any line of railway in the state, but that it was a common carrier between these two cities, and "that some of the goods that she shipped to Grand Rapids and carried to Grand Haven were destined and marked for places in other states than Michigan, and that some of the goods which she shipped at Grand Haven came from other states and were destined for places within that state." Judge Sanborn, from this question, reached the conclusion that "the power to regulate interstate commerce is as complete upon the land as upon the

<sup>99</sup> 10 Wall. 557.

navigable waters of the nation, and congressional regulation upon the former must be interpreted by the same rules and enforced with the same efficiency as like regulations upon the latter.<sup>40</sup> The plain and specific declaration of the acts of Congress before us, which have been recited,<sup>41</sup> and the familiar rule that where the terms of a statute are unambiguous and their meaning is plain there is no room for construction, and the apt and controlling opinion of the Supreme Court in the *Daniel Ball* case<sup>42</sup> which decided, in a case strictly analogous, the material legal questions in this case, urgently persuade that the Northwestern Company<sup>43</sup> was a common carrier engaged in interstate commerce by railroad within the meaning of the Safety Appliance Acts, and was thereby required to equip its cars with automatic couplers."<sup>44</sup> Nor can a railroad urge that it hauled the car the distance it did in order to reach its general repair shops, if it could have repaired the car at nearby points.<sup>45</sup>

**§ 134. United States against Geddes denied.**—In the case of the United States against Colorado and Northwestern

<sup>40</sup> Citing *In re Debs*, 158 U. S. 564; 15 Sup. Ct. Rep. 500; 39 L. Ed. 1092.

<sup>41</sup> Safety Appliance Act, p. 264.

<sup>42</sup> 10 Wall. 557.

<sup>43</sup> The narrow gauge railroad.

<sup>44</sup> *United States v. Colorado*, etc., R. Co. 157 Fed. Rep. 321; *United States v. Colorado*, etc., R. Co. 157 Fed. Rep. 342.

<sup>45</sup> *United States v. Chicago*, etc., Ry. Co. 149 Fed. Rep. 486.

A shipment from a point without the State of California was consigned to San Jose in that state. Before the shipment reached the state, and while in transit, the consignor, by agreement with one of the carriers, changed the destination from San Jose to Careaga.

It was held that the traffic being carried from San Jose to Careaga was interstate. *United States v. Pacific Ry. Co.* (see Appendix G).

The statute applies to a railroad in South Carolina authorized by its special charter to "farm out" the right of transportation. *Harden v. North Carolina R. Co.* 129 N. C. 354; 40 S. E. Rep. 184; 55 L. R. A. 784.

Under the Massachusetts statute, a car en route to a repair shop does not come within the statute prohibiting the "moving of traffic" in cars not equipped with automatic couplers. *Taylor v. Boston*, etc., R. Co. 188 Mass. 390; 74 N. E. Rep. 591.

Railroad Company,<sup>46</sup> Judge Sanborn of the Circuit Court of Appeals of the Eighth Circuit examines at length the case of the United States against Geddes<sup>47</sup> of the Circuit Court of Appeals of the Sixth Circuit and declines to follow it. We set out the review of that case to the full extent as made by Judge Sanborn, viz: "The argument of counsel for the company, in support of the construction adopted by the Court of Appeals of the Sixth Circuit, is (1) that the part of the first section of the 'interstate commerce act' quoted above, constituted a new and exclusive definition of carriers engaged in interstate commerce; (2) that Mr. Justice Shiras in *Texas and Pacific Ry. Co. v. Interstate Commerce Commission*,<sup>48</sup> in speaking of this act, said: 'It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting that wholly within a state) as well that between the states and territories as that going to or coming from foreign countries'; (3) that if that statement was accurate, then to be a 'common carrier engaged in interstate commerce by railroad' within the meaning of the Safety Appliance Act of 1893, which was enacted six years later, a railroad must be 'engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used, under a common control, management or arrangement for a continuous carriage or shipment' from one state to another; (4) that Congress sought to regulate interstate commerce by each act and that having defined interstate commerce in the first act, the words 'any common carrier engaged in interstate commerce' in the subsequent Safety Appliance Acts were restricted to those carriers specified in that definition, and included only such as were so engaged with others under a common control, man-

<sup>46</sup> 157 Fed. Rep. 321.

<sup>47</sup> 131 Fed. Rep. 452; 65 C. C. A. 320.

<sup>48</sup> *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*,

162 U. S. 197, at p. 212; 16 Sup. Ct. 666, at p. 672 (40 L. Ed. 940); reversing 4 Inter. St. Com. Rep. 408; 6 C. C. A. 653; 20 U. S. App. 1; 57 Fed. Rep. 948.

agement or arrangement for a continuous passage or shipment; and (5) that any other construction would compel railroad companies operating in single states, to which articles of interstate commerce that they might not lawfully refuse to carry were tendered for transportation, to comply with the Safety Appliance Acts, and would thereby draw all commerce under national regulation. A careful study of this argument in all its branches has brought to mind some reasons why it is not convincing, which will be briefly stated. The major premise of the argument is that Congress by the act of 1887, made an authoritative definition of carriers engaged in interstate commerce by railroad and partly by railroad and partly by water, to which subsequent legislation and decision is subject; that after the passage of that act no carrier by railroad and no carrier partly by railroad and partly by water, who conducted within a single state a part of the continuous transportation of articles of interstate commerce, was engaged in that commerce, unless it conducted that carriage with some other carrier under a common control, management or arrangement for a continuous carriage or shipment. Is this the true construction and effect of the first section of the interstate commerce act of 1887? When Congress passed that statute, conclusive decisions and universal assent had established the rule of law that common carriers engaged entirely within a single state in the transportation of articles of interstate commerce included two classes: (a) Those who conducted that transportation with another or other carriers under a common control, management or arrangement for a continuous carriage or shipment; and (b) those who conducted such transportation alone, or with other carriers without any common control, management or arrangement for such a carriage or shipment. The question whether or not carriers of the second class were engaged in interstate commerce was settled.<sup>49</sup> It was not acute, debatable or open, and the purpose of the

<sup>49</sup> The *Daniel Ball*, 10 Wall. Brown, Admr., Cas. 193; Fed. Cas. 55 505; 19 L. Ed. 999; reversing No. 3,564.

act of 1887 was not to answer it. If it had been the intention of Congress and the meaning of that act that the established rule of law upon that question should be abrogated, that a new definition of carriers engaged in interstate commerce should be made which would imperatively exclude the second class from interstate commerce, it is reasonable to believe that the law making body would have made this purpose to cause so radical a departure from the law of the land clear and indisputable by a direct declaration and enactment which could easily have been written in a few lines, that henceforth carriers engaged in interstate commerce by railroad should include those of the first class only, or that they should exclude those of the second class. But the act contains no such declaration or provision. On the other hand, in the face of the established rule of law that carriers by railroad engaged in interstate commerce consisted of both classes, the Congress enacted that 'the provisions of this act shall apply to' the members of the first class, and there it stopped and enacted nothing more pertinent to this issue. The existence of the two well known classes of carriers engaged in interstate commerce, the absence of any declaration or enactment that the rule which included the members of both classes among such carriers should be abrogated or in any way modified, and the simple declaration of the act that its provisions should apply to the members of the first class without more upon this subject, render it difficult to believe that the purpose or effect of the first section of this statute was any other than to select out of all the carriers engaged in interstate commerce by railroad or partly by railroad and partly by water, and to specify, as its clear and certain words purport to do, the class of those carriers to which its provisions apply. The remark of Mr. Justice Shiras in *Texas and Pacific Ry. Co. v. Interstate Commerce Commission*,<sup>50</sup> with reference to the interstate commerce act. that 'It would be difficult to use

<sup>50</sup> 162 U. S. 212; 16 Sup. Ct. 672 (40 L. Ed. 940).

language more unmistakably signifying that Congress had in view the whole field of commerce, excepting commerce wholly within a state,' is not persuasive upon the legal issue before us (a) because this question was not presented, discussed, or decided in that case, wherein the court was considering only the relation of the circumstances, conditions and rates of transportation of foreign commerce to the circumstances, conditions and rates of transportation of interstate commerce under the act of 1887, and expressions in the opinion of courts are not authoritative beyond the questions which they were considering and deciding when they used them.<sup>51</sup> (b) Because the statement that Congress had in view the whole field of interstate commerce when it passed this act is far from an assertion, and could never have been intended to be a declaration that Congress had regulated, or had intended by that act to regulate, every carrier engaged in interstate commerce within its regulating power, for that was obviously not the fact. It did not regulate and evidently did not intend to regulate carriers engaged in the transportation of subjects of interstate commerce by stage coach, by wagon, entirely by water, or such carriers partly by water and partly by railroad, when they were not operating with other carriers under a common control, management or arrangement; (c) because the statute expressly declared that the provisions of the act should apply to the members of a specific class of carriers engaged in interstate commerce, and omitted, and thereby excluded from subjection to its provisions, those of other classes. The amendatory act of June 29, 1906,<sup>52</sup> is a demonstration that the original act was not intended to and did not regulate all common carriers engaged in interstate commerce by railroad within the power of Congress, for the amendment applies the provisions of the act to common carriers engaged in interstate commerce wholly by railroad who are exempt from

<sup>51</sup> *Cohens v. Virginia*, 6 Wheaton, 204, 299; 5 L. Ed. 257.

<sup>52</sup> 34 Stat. 584, c. 3591, Sec. 1 (U. S. Comp. St. Supp. 1907, p. 892).

any common control, management or arrangement with other carriers, and applies its provisions to many other carriers not subject to the terms of the original act. The rule in *pari materia*, which counsel for the company invoke, the rule that the similar terms of statutes enacted for like purposes should receive like interpretations, is inapplicable to the interstate commerce act and the Safety Appliance Acts, because the provision of the latter relative to the question before us, is plain and explicit, and a statute falls under that rule only when its terms are ambiguous or its significance is doubtful,<sup>53</sup> and because the evils to be remedied, the objects to be accomplished, and the enactments requisite to attain them are radically different. It is true that each act was a regulation of interstate commerce, but so are the Sherman anti-trust act, the employers' liability act, the various acts regulating the inspection of steamboats, and the navigation of the inland rivers, lakes and bays, and many other acts, too numerous to mention or review. It does not follow from the facts that the interstate commerce act was first passed, and that it regulates commerce among the states, and declares that its provisions shall apply to the members of a certain class of carriers engaged therein, that the Sherman anti-trust act, the Safety Appliance Acts, and other subsequent acts regulating commerce apply to the members of that class only, in the face of the positive declarations of the later acts that they shall govern other parties and other branches of commerce. The subject of the first act was the contracts, the rates of transportation of articles of interstate commerce; the subject of the Safety Appliance Acts was the construction of the vehicles, the cars, and engines which carry that commerce. The evils the former was passed to remedy were discrimination and favoritism in contracts and rates of carriage; the evils the latter was enacted to diminish were injuries to the employes of carriers by the use of dangerous cars and engines. The remedy

<sup>53</sup> Endlich on Interpretation of Statutes, Sec. 53 p. 67.



for the mischiefs which induced the passage of the former act was equality of contracts and rates of transportation; the remedy for the evils at which the latter act was leveled was the equipment of cars and engines with automatic couplers. Neither in their subjects, in the mischiefs they were enacted to remove, in the remedies required, nor in the remedies provided, do these acts relate to similar matters, and the rule that the words or terms of acts in *pari materia* should have similar interpretations ought not to govern their construction. The contention that if a railroad company conducting the transportation of articles of interstate commerce entirely within a single state and independent of other carriers, is held to be subject to the Safety Appliance Acts, it must receive articles of interstate commerce *for* transportation, and all carriage, both interstate and intrastate, will thus become subject to national regulation, neither terrifies nor convinces. The constitution reserved to the nation the unlimited power to regulate interstate and foreign commerce, and if that power cannot be effectually exercised without affecting intrastate commerce, then Congress may undoubtedly in that sense regulate intrastate commerce so far as necessary, in order to regulate interstate commerce fully and effectually. The people of the United States carved out of their sovereign power, reserved from the states, and granted to the Congress of the United States exclusive and plenary power to regulate commerce among the states and with foreign nations. That power is not subordinate, but it is paramount to all the powers of the states. If its independent and lawful exercise of this congressional power and the attempted exercise by a state of any of its powers impinge or conflict, the former must prevail and the latter must give way. The constitution and the acts of Congress passed in pursuance thereof are the supreme law of the land. 'That which is not supreme must yield to that which is supreme.'<sup>54</sup> It was the evident and declared purpose of the

<sup>54</sup> *Brown v. Maryland*, 12 Wheat. v. *Ogden*, 9 Wheat. 1, 209, 210; 419, 448; 6 L. Ed. 678; *Gibbons* 6 L. Ed. 23; *Gulf, Colorado, etc.*,

Safety Appliance Acts to require every common carrier engaged in interstate commerce, and hence every common carrier so engaged independently in a single state, to comply with the requirements of the statute. No greater burden is thereby imposed upon a company engaged in such commerce within one state than upon one so engaged in more than one state. There was as urgent a demand, and as much reason and necessity, for the protection of the lives and limbs of the servants of railroad companies operating in a single state, as of preserving the lives and limbs of the servants of such companies operating across state lines. The Safety Appliance Acts might be practically evaded and thus rendered futile if companies independently transporting articles of interstate commerce in single states could exempt themselves from their provisions by conducting all such transportation, except that across the imaginary lines which divide the states, by means of corporations operating in single states only, and finally the objection here under consideration was determined to be untenable by the controlling opinion of the Supreme Court in the *Daniel Ball* case,<sup>55</sup> where it was equally available, was considered and overruled, for Congress has the

*Ry. Co. v. Hefley*, 158 U. S. 98; 15 Sup. Ct. 802; 39 L. Ed. 910; *Int. State Commerce Com. v. Detroit, etc.*, *Ry. Co.* 167 U. S. 633, 642; 17 Sup. Ct. 986; 42 L. Ed. 306; *State Freight Tax Case*, 15 Wall. 232, 275, 280; 21 L. Ed. 146; *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 8; 24 L. Ed. 708; *Chy Lung v. Freeman*, 92 U. S. 275, 280; 23 L. Ed. 550; *Ry. Co. v. Husen*, 95 U. S. 465, 471, 472, 473; 24 L. Ed. 527; *Hall v. De Cuir*, 95 U. S. 485, 488-490, 497, 498-513; U. S. 485, 488-490, 497, 498-513; 24 L. Ed. 547; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 736, 737; 5 Sup. Ct. 739; 28 L. Ed. 1137; *Bowman v. Chicago, etc., Ry. Co.* 125 U. S. 465, 479, 480, 481, 484, 485, 488, 489, 490, 491, 507, 508; 8 Sup. Ct. 689, 1062; 31 L. Ed. 700; *Welton v. Missouri*, 91 U. S. 275, 280; 23 L. Ed. 347; *Lyng v. Michigan*, 135 U. S. 161, 166; 10 Sup. Ct. 725; 34 L. Ed. 150; *Norfolk, etc., Ry. Co. v. Pennsylvania*, 136 U. S. 114, 115, 118, 120; 10 Sup. Ct. 958; 34 L. Ed. 394; *Crutcher v. Kentucky*, 141 U. S. 47, 57, 58, 59; 11 Sup. Ct. 851; 35 L. Ed. 649; *Osborne v. Florida*, 164 U. S. 650, 655; 17 Sup. Ct. 214; 41 L. Ed. 586; *Caldwell v. North Carolina*, 187 U. S. 622, 623; 23 Sup. Ct. 229; 47 L. Ed. 336.

<sup>55</sup> 10 Wall. 565; 19 L. Ed. 999.

same 'fulness of control' over interstate commerce carried upon railroads and other artificial highways upon the land that it has over that borne upon the navigable waters of the nation.<sup>56</sup> Some of the reasons why the argument of counsel in support of the construction of these acts which they seek, has not proved convincing, have now been stated. There are, however, other and controlling considerations which deter us from the conclusion they urge. Congress enacted that 'it shall be unlawful for any common carrier engaged in interstate commerce by railroad' to haul any car on its line, used in moving interstate traffic, unequipped with automatic couplers, except four-wheeled cars and certain logging cars and the engines which draw them. The construction of this enactment sought in effect amends this positive declaration by importing into it the exception which appears in italics below, so that it would read, 'it shall be unlawful for any common carrier engaged in interstate commerce by railroad, \* \* \* *except a common carrier engaged in interstate commerce by railroad wholly within a single state and not under a common control, management or arrangement with any other carrier for a continuous carriage or shipment*' to haul any car on its line used in moving interstate traffic unequipped with automatic couplers, except four-wheeled cars and certain logging cars and the engines used to haul them. But where the Congress makes no exception from the clear and certain declaration of a statute, there is ordinarily a presumption that it intended to make none.<sup>57</sup> By so much the more is it true that where the lawmaking body has made exceptions to the general terms of an act, as in this instance, the presumption is that it intended to make no more. Again, if Congress intended to make this exception, it was a secret intention which the Safety Appliance Acts not only failed to

<sup>56</sup> *In re Debs*, 158 U. S. 590, 591; 15 Sup. Ct. 900; 39 L. Ed. 1092.

<sup>57</sup> *McIver v. Ragan*, 2 Wheat. 25, 29; 4 L. Ed. 175; *Bank v. Dalton*, 9 How. 522, 528; 13 L.

Ed. 242; *Vance v. Vance*, 108 U. S. 514, 521; 2 Sup. Ct. 854; 27 L. Ed. 808; *Railway Co. v. B'Shears*, 59 Ark. 237, 244; 27 S. W. 2.

express, but which their terms expressly negatived. It is the intention expressed, or necessarily implied, in the law, and that alone, to which courts may lawfully give effect. They may not assume or presume purposes and intentions that are neither expressed or implied, and then construe into the law the provisions to accomplish these assumed intentions. A secret intention of the lawmaking body cannot be legally interpreted into a statute which is plain and unambiguous, and which does not express or imply it.<sup>58</sup> The principal reasons which have been persuasive in the determination of the question in hand have now been stated. They have been presented at considerable length in deference to the opinion of the Court of Appeals of the Sixth Circuit in the Geddes case, which it would have been a pleasure to follow, if the proper result had been doubtful in our opinion. But this case has been presented to this court for decision. The exercise of its independent judgment has been invoked, and it may not be lawfully denied. The positive and explicit declaration of the first section of the Safety Appliance Act of 1893 that 'it shall be unlawful for any common carrier engaged in interstate commerce by railroad' to use any cars unequipped with automatic couplers except four-wheeled cars and logging cars in moving interstate traffic, the clearness and certainty of this language which prohibits interpretation, the absence of any expression of the exception which the court is asked to import into this statute, the presumption from the plain language of the law that the Congress intended to make no such exception, the rule that the courts may not insert in a statute an enactment of an assumed secret intention of the lawmaking body which is not expressed therein or necessarily implied, the fact that the interstate commerce act does not appear to us to define common carriers engaged in interstate commerce by railroad, but simply to apply the provisions of that act to

<sup>58</sup> U. S. v. Wiltberger, 5 Wheat. 95 Am. Dec. 152; Smith v. State, 76; 5 L. Ed. 37; Bennett v. 66 Md. 215; 7 Atl. 49; Railway Worthington, 24 Ark. 487, 494; Co. v. Bagley, 60 Kan. 424; 56 Tynan v. Walker, 35 Cal. 634; Pac. 759.

the members of a specified class of these carriers, the fact that the interstate commerce act is not in *pari materia* with the Safety Appliance Acts, either in its subject-matter, in the evils it assails, or in the remedies it provides, so that neither its language nor the construction thereof is apposite to or controlling of the terms or of the interpretation of the latter act, the reason of the case which as imperatively requires the protection from dangerous vehicles of the employes of companies independently engaged in interstate commerce by railroad entirely within single states, as it does the protection of the servants of other companies employed in the transportation of articles of interstate commerce by railroad, all these and other facts, rules and reasons to which reference has been made, have converged upon our minds with compelling power, and forced them to the conclusion that Congress did not intend to, and did not except from the provisions of the Safety Appliance Acts common carriers engaged in the transportation of articles of interstate commerce entirely within single states respectively, and exempt from any common control, management or arrangement with other carriers for a continuous carriage or shipment, but that it intended to, and did, expressly include them therein and subject them thereto."<sup>89</sup>

§ 135. **Burden—Reasonable doubt.**—What is interstate commerce has been discussed in other sections. He who alleges that the car causing the injury by reason of defective coupling, or rather by a failure to comply with the statute with regard to automatic coupling, has the burden to prove that the car at the time was used in interstate commerce,<sup>90</sup>

<sup>89</sup> United States v. Colorado, etc., Ry. Co. 157 Fed. 321.

<sup>90</sup> United States v. Illinois Central R. Co. 156 Fed. Rep. 182; United States v. Central of Ga. Ry. 157 Fed. Rep. 893; Kansas City, etc., R. Co. v. Flipppo, 138 Ala. 487; 35 So. Rep. 457; Mis-

souri Pacific R. Co. v. Kennet (Kan.) 99 Pac. Rep. 263; United States v. Chicago, etc., R. Co. 162 Fed. Rep. 775; United States v. Louisville, etc., R. Co. 162 Fed. Rep. 185; United States v. Philadelphia, etc., R. Co. 160 Fed. Rep. 696; 162 Fed. Rep. 403; United

or was hauled in an interstate commerce train.<sup>60\*</sup> In the case of an empty car hauled in a train, it must be shown that it was used or was intended to be used in moving interstate traffic. In a criminal case it has been held that this must be shown beyond a reasonable doubt.<sup>61</sup> Of course, in a civil case the doctrine of reasonable doubt is not involved. Nearly three years before these cases first cited had been decided the Supreme Court of the United States had said in a civil case: "But the design to give relief was more dominant than to inflict punishment, and the act might be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs, that rule not requiring absolute strictness of construction."<sup>62</sup> The first case cited in this section was in the District Court for the Western District of Kentucky. A month before it was decided the judge of the District Court for the Northern District of Alabama charged the jury as follows: "The burden is upon the government to make out its case to a reasonable certainty—that is, to your reasonable satisfaction—by a preponderance of the evidence. If you find, therefore, from a preponderance of the evidence in this case that the defendant was a common carrier engaged in interstate traffic by rail-

*States v. Pennsylvania R. Co.* 162 Fed. Rep. 408; *United States v. Philadelphia, etc., R. Co.* 162 Fed. Rep. 405; *United States v. Lehigh Valley R. Co.* 162 Fed. Rep. 410.

In a prosecution to recover the penalty for the violation of the statute within a territory, it is not necessary to prove that the defendant was engaged in interstate commerce, neither is it necessary to show that the car itself was engaged in such commerce. *United States v. Atchison, etc., R. Co.* (see Appendix G).

<sup>60\*</sup> *Elgin, etc., R. Co. v. United States*, 167 Fed. Rep. — (de-

cided February 3, 1909); *United States v. Chicago, etc., R. Co.* 162 Fed. Rep. 775.

<sup>61</sup> *United States v. Illinois Cent. R. Co.* 156 Fed. Rep. 182.

<sup>62</sup> *Johnson v. Southern Pac. Ry. Co.* 196 U. S. 1; 25 Sup. Ct. Rep. 158, reversing 117 Fed. Rep. 462; 54 C. C. A. 508; citing *Taylor v. United States*, 3 How. 197; 11 L. Ed. 559; *United States v. Stowell*, 133 U. S. 1; 10 Sup. Ct. Rep. 244; 33 L. Ed. 555; *Farmers, etc., Bank v. Dearing*, 91 U. S. 29; 23 L. Ed. 196; *Gray v. Bennett*, 3 Met. 522.

ployes are required to handle cars not equipped as required by the statutes, without regard to the question whether the cars are loaded or not. Legislation on this matter of the use of automatic couplers was sought and obtained from Congress, as well as from the state legislature, so that companies would not be afforded a loophole for escape from liability on the theory that the agencies used in interstate commerce are without the control of the state legislatures. When companies, like the defendant in this case, are engaged in interstate traffic, it is their duty, under the act of Congress, not to use, in connection with such traffic, cars that are not equipped as required by that act. This duty of proper equipment is obligatory upon the company before it uses the car in connection with interstate traffic, and it is not a duty which only arises when the car happens to be loaded with interstate traffic. It frequently happens that the railway companies load cars with live stock or farm produce in the western states and carry the same to eastern markets, and then return those cars without a load; but it cannot be true that on the eastern trip the provisions of the act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty. Whatever cars are designed for interstate traffic, the company owning or using them is bound to equip them as required by the act of Congress; and when it is shown, as it was in this case, that a railway company is using a car for transportation purposes between the two states, sufficient is shown to justify the court in ruling that the act of Congress is applicable to the situation.”<sup>a</sup>

<sup>a</sup> Voelker v. Chicago, etc., Ry. Co. 116 Fed. Rep. 807; Malott v. Hood, 201 Ill. 202; 66 N. E. Rep. 247 (affirming 99 Ill. App. 360); United States v. St. Louis, etc., Ry. Co. 154 Fed. Rep. 516; United States v. Illinois Cent. R. Co. 156 Fed. Rep. 182; United States v. Chicago, etc., R. Co. 156 Fed.

Rep. 616; United States v. Northern Pac. T. Co. 144 Fed. Rep. 861; Johnson v. United States, 196 U. S. 1; 25 Sup. Ct. Rep. 158; reversing 54 C. C. A. 508; 117 Fed. Rep. 462; Flgin, etc., R. Co. v. United States, 167 Fed. Rep. — (decided February 3, 1909).

The cases squarely hold that the

**§ 138. Empty car used in interstate train.**—It has been laid down that in order to inflict a penalty for the use of an empty car hauled in an interstate train it must be shown that the car was used (or intended, perhaps, to be used) in moving interstate traffic.<sup>9</sup> The mere hauling of an empty car from one state to another, though it may be for repairing a defect in it, is engaging in interstate commerce;<sup>10</sup> and there is no distinction between hauling a car actually engaged in interstate commerce and hauling one that is generally used in moving interstate traffic, although not actually so engaged at the time when the offense is charged as being committed.<sup>11</sup>

**§ 138a. Hauling empty car to repair shop.**—A carrier may move empty cars by themselves to repair shops for the purpose of having them placed in a condition to conform to the Safety Appliance Acts without incurring the penalty of the Statute.<sup>11\*</sup> But if the movement is made in connection with cars loaded with interstate traffic, then the carrier is subject to the statutory penalty.<sup>11a</sup>

**§ 139. Proviso to Section 6—Four-wheeled and logging cars.**—The plaintiff, nor the government, need not negative the provisions contained in the proviso of Section 6 relating to four-wheeled and logging cars. If the cars that were not

hauling of an empty car from one point in a state to another in the same state in a train where cars are loaded with interstate commerce is a violation of the statute. *Wabash Ry. Co. v. United States*, 167 Fed. Rep. — (decided February 3, 1909); *United States v. Atlantic Coast Line R. Co.* Appendix G; *Chicago, etc., R. Co. v. United States*, 167 Fed. Rep. — (decided March 10, 1909); *United States v. Southern Ry. Co.* Appendix G, p. 343).

<sup>9</sup> *United States v. Chicago, Ry. Co.* 156 Fed. Rep. 182; *United*

*States v. Great Northern Ry. Co.* 145 Fed. Rep. 438; *United States v. St. Louis, etc., Ry. Co.* 154 Fed. Rep. 516; *Mobile, etc., R. Co. v. Bromberg*, 141 Ala. 258; 37 So. Rep. 395; see note 8 above.

<sup>10</sup> *United States v. Chicago, etc., Ry. Co.* 157 Fed. Rep. 616.

<sup>11</sup> *United States v. Chicago, etc., Ry. Co.* 157 Fed. Rep. 616.

<sup>11\*</sup> *Chicago, etc., R. Co. v. United States*, 167 Fed. Rep. — (decided March 10, 1909).

<sup>11a</sup> *Chicago, etc., R. Co. v. United States*, *supra*. See Section 127.



properly equipped were of that class it is a matter of defense.<sup>12</sup> The burden is also upon the defendant to show that the cars were of that kind.<sup>13</sup>

**§ 140. Kind of coupler to be used.**—No particular kind of coupler need be used. The sole requirement is that couplers must be used that will couple “automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars” to uncouple them. This is the use. Thus, the court in one case charged the jury as follows: “Should you find the tender at the time of accident was equipped with automatic couplers, but that it was so connected with the ‘bull-nose’ coupler that the coupling with other cars was not made automatically by impact, but so equipped that it made it necessary for men to go between the ends of the cars to couple and uncouple, then such coupling did not comply with the acts of Congress, and was unlawful;”<sup>14</sup> the instruction was held to be a correct statement of the requirement of the statute, the court saying: “The true intent and meaning of the statute is not merely that the cars, etc., used

<sup>12</sup> *Schlemmer v. Buffalo, etc., R. Co.* 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 681; reversing 207 Pa. St. 198; 56 Atl. Rep. 417; *United States v. Atlantic, etc., R. Co.* 153 Fed. Rep. 918; *Ryan v. Carter*, 93 U. S. 78; *United States v. Dixon*, 15 Pet. 141; *Interstate Commerce Commission v. Baird*, 194 U. S. 25; 24 Sup. Ct. Rep. 563; 48 L. Ed. 860; reversing 123 Fed. Rep. 969.

<sup>13</sup> *Schlemmer v. Buffalo, etc., R. Co.* *supra*; *United States v. Cook*, 17 Wall. 168; 21 L. Ed. 538; *Commonwealth v. Hart*, 11 Cush. 130; *United States v. Denver, etc., R. Co.* 163 Fed. Rep. 519; *Smith v. United States*, 157 Fed. Rep. 721; 85 C. C. A.; *United States v. Atlantic, etc., R. Co.* 153 Fed. Rep. 918.

<sup>14</sup> *Winkler v. Philadelphia, etc., Ry. Co.* 4 Penn. (Del.) 80; 53 Atl. Rep. 90; *United States v. Southern Ry. Co.* 135 Fed. Rep. 122; *United States v. Louisville, etc., R. Co.* 162 Fed. Rep. 185; *United States v. Philadelphia, etc., R. Co.* 160 Fed. Rep. 696; 162 Fed. Rep. 403; *United States v. Pennsylvania R. Co.* 162 Fed. Rep. 408; *United States v. Philadelphia, etc., R. Co.* 162 Fed. Rep. 405; *United States v. Lehigh Valley*, 162 Fed. Rep. 410; *United States v. Atchison, etc., R. Co.* (Appendix G, pp. 299, 329, 333); *United States v. Chesapeake & Ohio Ry.* (see Appendix G, p. 339); *United States v. Southern Pacific Co.* (see Appendix G, p. 343).

in moving interstate commerce shall be equipped with automatic couplers of the description therein mentioned, but also that such couplers shall be in such condition as to be used automatically while such cars are so engaged."<sup>15</sup> Of course, the person alleging that a car was inadequately equipped has the burden to show that as a fact;<sup>16</sup> and evidence merely of a defect in the coupler will not sustain the averment that the cars were not equipped with automatic couplers.<sup>17</sup> If the lever of a car coupler will not lift the pin from the socket, and the knuckle cannot be drawn open by leaning toward the coupler and using one hand, but to open it requires the presence of the employes between the ends of the cars, and the use of both hands, thereby necessitating the placing of the entire body of the employe between the draw bars of the car, the coupler does not comply with the statute.<sup>18</sup> It is no de-

<sup>15</sup> Philadelphia, etc., R. Co. v. Winkler, 4 Penn. (Del.) 387; 112 Atl. Rep. 56; Voelker v. Chicago, etc., R. Co. 116 Fed. Rep. 867; Southern Ry. Co. v. Simmons (Va.), 55 S. E. Rep. 459; 44 Am. & Eng. R. Cas. 572; United States v. El Paso, etc., R. Co. (see Appendix); Johnson v. Southern Pac. Co. 196 U. S. 1; 25 Sup. Ct. Rep. 158, 49 L. Ed. 363; reversing 54 C. C. A. 508, 117 Fed. Rep. 462; United States v. Chicago, etc., R. Co. 149 Fed. Rep. 486; Winkler v. Philadelphia, etc., Ry. Co. 4 Penn. (Del.) 387; 53 Atl. Rep. 90.

<sup>16</sup> Philadelphia, etc., Ry. Co. v. Winkler, 4 Penn. (Del.) 387; 56 Atl. Rep. 112.

<sup>17</sup> Kansas City, etc., R. Co. v. Flippo, 138 Ala. 487; 35 So. Rep. 467.

<sup>18</sup> Chicago, etc., Ry. Co. v. Voelker, 129 Fed. Rep. 522; 65 C. C. A. 65; 70 L. R. A. 264; S. C. 116 Fed. Rep. 867; United States v. El Paso R. Co. (Appendix G, pp. 274,

279); United States v. Nevada, etc., R. Co. (see Appendix G, p. 337).

The Canadian statute (55 Vict. Ch. 30, Sec. 3) prohibits cars having buffers of different heights, so that in coupling they overlap and afford no protection to the person making the coupling, being a "defect in the arrangement of the plant." Board v. Toronto Ry. Co. 22 Ont. App. 78, affirming 24 Can. Sup. Ct. 715.

Where the chain which connected the lock pin to the uncoupling lever was not attached and only need to be connected to make the appliance available, it was held that the car in such condition was out of repair, as it was not legally equipped until the chain was connected; and in the absence of evidence showing that the chain was ever attached, it was presumed, since the working parts were in perfect order, that the apparatus was only partially completed and that it was the ultimate intention to connect the

fense, if a car is not properly equipped, to show that the adjoining car was not, thereby rendering it impossible to use the couplings.<sup>18\*</sup>

§ 141. "Without the necessity of men going between the ends of cars."—The words "without the necessity of men going between the ends of cars" applies more than to the act of coupling. "The phrase literally covers both coupling and uncoupling, and if read, as it should be, with a comma after the word 'uncoupled,' this becomes entirely clear." "In the present case the couplings would not work together, Johnson was obliged to go between the cars, and the law was not complied with.<sup>19</sup> So the car must be so equipped that it can be coupled from either side without going between them to couple them; and if so equipped that they can be coupled from one side without going between them and not from the other, the statute is not complied with.<sup>20</sup>

§ 142. Both ends of every car must be equipped with automatic couplers.—A car is not properly equipped unless it

parts and to thereby comply with the provisions of the statute. *United States v. Great Northern Ry. Co.* 150 Fed. Rep. 229; *United States v. Chicago, etc., R. Co.* 149 Fed. Rep. 486; *Donegan v. Baltimore, etc., R. Co.* 165 Fed. Rep. 869.

<sup>18\*</sup> *United States v. Atchison, etc., R. Co.* (see Appendix G). If a servant of the company deliberately puts on an imperfect coupling the company is still liable. *United States v. Southern Pac. Co.* (see Appendix G); *Chicago, etc., R. Co. v. King*, 167 Fed. Rep. — (decided February 3, 1909).

<sup>19</sup> *Johnson v. Southern Pac. Ry. Co.* 196 U. S. 1; 25 Sup. Ct. Rep. 158; reversing 117 Fed. Rep.

462; *United States v. Central of Ga. Ry. Co.* 157 Fed. Rep. 893; *Harden v. North Carolina R. Co.* 129 N. C. 354; 40 S. E. Rep. 184; 55 L. R. A. 784; *Chicago, etc., Ry. Co. v. Voelker*, 129 Fed. Rep. 522; 65 C. C. A. 65; 70 L. R. A. 264; *United States v. Chicago, etc., Ry. Co.* 149 Fed. Rep. 486; *Schlemmer v. Buffalo, etc., Ry. Co.* 205 U. S. 1; 27 Sup. Ct. Rep. 407; *United States v. El Paso, etc., R. Co.* (Appendix G, pp. 274, 279).

<sup>20</sup> *United States v. Central of Ga. Ry. Co.* 157 Fed. Rep. 893; *Southern Ry. Co. v. Simmons (Va.)*; 55 S. E. Rep. 459; 44 Am. & Eng. R. Cas. 572; *United States v. Atchison, etc., R. Co.* (Appendix G, pp. 299, 329, 333).

is equipped on both ends with automatic couplers. "The Safety Appliance Act requires that each coupler on a car be operative in itself, so an employe will not have to go to another car to couple or uncouple the car in question. The provisions as to coupling and uncoupling apply to the coupler on each end of every car subject to the law. It is wholly immaterial in what condition was the coupler on the adjacent car or any other car or cars to which each car sued upon was, or was to be, coupled. The equipment on each end of these two cars must be in such condition that whenever called upon for use it can be operated without the necessity of going between the ends of the cars. This is the plain and unambiguous meaning of the statute."<sup>21</sup>

**§ 143. Uncoupling**—The coupler must be sufficient to enable the employe to uncouple the car without going between the cars coupled, for that purpose.<sup>21</sup> If, therefore, a coupler couples by impact, but cannot be uncoupled without the employe going between the cars, it is not sufficient.<sup>22</sup>

<sup>21</sup> *Chicago, etc., Ry. Co. v. Voelker*, 129 Fed. Rep. 522; 65 C. C. A. 65; 70 L. R. A. 264.

A man engaged in connecting or disconnecting air hose between the cars is engaged in coupling or uncoupling cars within the meaning of the statute, if it is necessary for him to connect or disconnect that hose in order to connect or disconnect the cars. *United States v. Boston, etc., R. Co.* (see Appendix G).

The coupling must be in such a condition that it can be operated with a reasonable effort, and not by a great effort without going between the cars. *United States v. Atchison, etc., R. Co.* (see Appendix G, pp. 299, 329, 333).

<sup>22</sup> *United States v. Chicago, etc., Ry. Co.* 149 Fed. Rep. 486; *United States v. Great Northern*

*Ry. Co.* 150 Fed. Rep. 529; *United States v. Southern Ry. Co.* 135 Fed. Rep. 122; *United States v. El Paso, etc., R. Co.* Pamphlet of Inter. St. Commerce Com. 1907, p. 143 (Appendix 274).

<sup>23</sup> *United States v. Central of Ga. Ry. Co.* 157 Fed. Rep. 893; *United States v. Pennsylvania R. Co.* 162 Fed. Rep. 408 (Appendix G, p. 321); *United States v. Philadelphia, etc., R. Co.* 162 Fed. Rep. 405 (Appendix G, p. 315); *United States v. Lehigh Valley R. Co.* 162 Fed. Rep. 410 (Appendix G, p. 311); *United States v. Chesapeake, etc., Ry. Co.* 166 Fed. Rep. — (decided December 2, 1908); *United States v. Southern Pac. Ry. Co.* 167 Fed. Rep. — (decided December 4, 1908); *United States v. Atchison, etc., Ry. Co.* 167 Fed. Rep. — (de-

**§ 144. Erroneous instructions concerning height of draw bars.**—An instruction is erroneous which declares that the law requires draw bars of a fully loaded car to be of the height of thirty-one and one-half inches, and that if either of the cars causing the injury to the employe varied from the requirement the defendant railroad had failed in the performance of its duty; especially where the evidence of the railroad company showed that the draw bar of the fully loaded car was thirty-two and one-half inches in height. A verdict for the plaintiff on such a condition of the record cannot stand. And so it is error to refuse to charge the jury “that when one car is fully loaded and another car in the same train is only partially loaded, the law allows a variation of full three inches between the center of the draw bars of such cars, without regard to the amount of weight in the partially loaded car.”<sup>24</sup> So an instruction as follows is erroneous: “The court charges you that the act of Congress allows a variation in height of three inches between the centers of draw bars of all cars used in interstate commerce, regardless of whether they are loaded or empty, the measurement of such height to be made perpendicularly from the top of the rail to the center of the draw bar shank or draft line.”<sup>25</sup>

**§ 145. Construction of Section 5.**—The Supreme Court of the United States has thus construed Section 5 so far as it relates to couplings: “We think that it [Section 5] requires the center of the draw bars of freight cars used on standard gauge railroads shall be, when the cars are empty, thirty-four and one-half inches above the level of the tops of the

cided December 1, 1908); *United States v. Atchison, etc., R. Co.* (see Appendix G, pp. 299, 329, 333).

<sup>24</sup> “This request, taken in connection with the instruction that the drawbar should be of the height prescribed by this act, expressed the true rule, and should have been given.”

<sup>25</sup> “It is based upon the theory that the height of the drawbars of unloaded cars may vary three inches, while the act, as we have said, requires that the height of the drawbars of unloaded cars shall be uniform.” *St. Louis, etc., Ry. Co. v. Taylor*, 210 U. S. 281; 28 Sup. Ct. Rep. 616.

rails; that it permits, when a car is partly or fully loaded, a variation in the height downward, in no case to exceed three inches; that it does not require that the variation shall be in proportion to the load, nor that a fully loaded car shall exhaust the full three inches of the maximum permissible variation and bring its draw bars down to the height of thirty-one and one half inches above the rails. If a car, when unloaded, has its draw bars thirty-four and one-half inches above the rails, and, in any stage of loading, does not lower its draw bars more than three inches, it complies with the requirements of the law. If, when unloaded, its draw bars are of greater or less height than the standard prescribed by the law, or if, when wholly or partially loaded, its draw bars are lowered more than the maximum variation permitted, the car does not comply with the requirements of the law.”<sup>26</sup>

**§ 146. Insufficient operation of coupler.**—The statute does not apply to an instance of insufficient operation of a proper coupler.<sup>27</sup>

**§ 147. Improper operation of sufficient coupler.**—The statute only makes it unlawful to use a car which is not equipped with the required couplers, and it cannot be held that it is unlawful for a carrier’s employes to fail to adjust the appliance with which the car has been, and at the time is, properly equipped. “The act requires equipment, and, although there is no express language to that effect, the act must be construed to mean equipment which, if there, is capable of being operated; but no penalty is imposed, if, being there, it is not in fact efficiently operated by those in and not the proper manipulation of that equipment by the employes.”<sup>28</sup>

**§ 148. Preparation of coupler for coupling.**—The act of coupling and the preparation of the coupler for the impact

<sup>26</sup> St. Louis, etc., Ry. Co. v. Taylor, 210 U. S. 281; 28 Sup. Ct. Rep. 616.

<sup>27</sup> United States v. Illinois Central R. Co. 156 Fed. Rep. 182.

<sup>28</sup> United States v. Chicago, etc., R. Co. 156 Fed. Rep. 182.

are not to be distinguished. Such preparation and impact are so connected that they are indispensable parts of the larger act to which the statute applies and regulates, the performance of which Congress intended to be relieved from unnecessary risk and danger to life and limb.<sup>29</sup>

§ 149. "M. C. B. defect card."—The placing of a "M. C. B. defect card" upon a car with an annotation thereon of defects forbidden by the Safety Appliance Act, thereby informing all companies receiving it that the company so placing the card on the car sent such car out in a defective condition and that the companies receiving and hauling the car would not have to account to the former company for the particular defect noted on the car, is such a deliberate violation of the statute as amounts to a defiance of the law.<sup>30</sup>

§ 150. Receiving an improperly equipped foreign car.—If a foreign car be not equipped with automatic couplers, a railroad company to whom it is tendered for transportation by a connecting line is not bound to receive it for transportation over its lines, and may lawfully refuse to accept it until it is properly equipped.<sup>31</sup> But if it does receive it and uses it or hauls it upon its tracks, the receiving company will be liable.<sup>32</sup>

§ 151. Question for jury.—It is a question for the jury whether the tender and car between which the employe was injured were at the time engaged in interstate commerce; and they may be instructed that if they so find, the act of Congress was applicable.<sup>33</sup>

<sup>29</sup> Chicago, etc., Ry. Co. v. Voelker, 129 Fed. Rep. 522; 65 C. C. A. 65; 70 L. R. A. 264. See note 21 of this chapter.

<sup>30</sup> United States v. Southern Ry. Co. 135 Fed. Rep. 122; United States v. Chicago, etc., R. Co. (see Appendix G).

<sup>31</sup> See Sec. 3 of Act.

<sup>32</sup> United States v. Chicago, etc., Ry. Co. 149 Fed. Rep. 486; see

also United States v. Chicago, etc., Ry. Co. 143 Fed. Rep. 373.

<sup>33</sup> Philadelphia, etc., R. Co. v. Winkler, 4 Penn. (Del.) 387; 56 Atl. Rep. 112; affirming 4 Penn. (Del.) 80; 53 Atl. Rep. 90; Voelker v. Chicago, etc., R. Co. 116 Fed. Rep. 867; Crawford v. New York, etc., R. Co. 10 Am. & Eng. Neg. Cas. 166.

§ 152. **When a federal question is presented.**—Where the question arose whether or not a federal question was involved in a case brought under the Safety Appliance Act, the Supreme Court announced this rule: "Where a party to a litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed by this court. The plain reason is that in all such cases he has claimed in the state court a right or immunity under a law of the United States and it has been denied him. Jurisdiction so clearly warranted by the constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the states of the Union." <sup>24</sup>

§ 153. **State statute on same subject applicable to intra-state commerce.**—It would seem that a state statute requir-

<sup>24</sup> St. Louis, etc., R. Co. v. Taylor, 210 U. S. 281; 28 Sup. Ct. Rep. 616; 52 L. Ed. 1061.

The court said the above stated principles were derived from the following cases: McCormick v. Market Bank, 165 U. S. 538; 17 Sup. Ct. Rep., 433. 41 L. Ed. 817; affirming 162 Ill. 100; 44 N. E. Rep. 381; California Bank v. Kennedy, 167 U. S. 362; 17 Sup. Ct. Rep. 831; 42 L. Ed. 198, reversing 101 Cal. 495; 40 Am. St. Rep. 69; 35 Pac. Rep. 1039; San Jose Land, etc., Co. v. San Jose Ranch Co. 189 U. S. 177; 23 Sup. Ct. Rep. 487; 47 L. Ed. 765; affirming 129 Cal. 673; 62 Pac.

Rep. 269; Nutt v. Knut, 200 U. S. 12; 26 Sup. Ct. Rep. 216; 50 L. Ed. 348; affirming 83 Miss. 365; 35 So. Rep. 686; 102 Am. St. Rep. 452; 84 Miss. 465; 36 So. Rep. 689; reversing 84 Miss. 465; 36 So. Rep. 689; Rector v. City Deposit Bank, 200 U. S. 405; 26 Sup. Ct. Rep. 289; 50 L. Ed. 527; Eau Claire National Bank v. 527; Illinois Cent. R. Co. v. McKendree, 203 U. S. 514; 27 Sup. Ct. Rep. 153; 51 L. Ed. 298; Eau Claire National Bank v. Jackman, 204 U. S. 522; 27 Sup. Ct. Rep. 391; 51 L. Ed. 596; affirming 125 Wis. 465; 104 N. W. Rep. 98; Hammond v. Whit-



ing automatic couplers upon cars used within a state might be enforced in a suit to recover damages caused because of a failure to equip cars used in interstate commerce.<sup>35</sup>

§ 154. **Handholds—Through train.**—The statute requires cars to be furnished with handholds. Cars in a train operated by a railway company engaged in the transportation of freight across a state and beyond its boundaries is a "through train," and every car in it must be furnished with "handholds." A failure to furnish them is negligence *per se*.<sup>36</sup>

tredge, 204 U. S. 538; 27 Sup. Ct. Rep. 396; 51 L. Ed. 606; affirming 189 Mass. 45; 75 N. E. Rep. 222.

<sup>35</sup>See Voelker v. Chicago, etc., R. Co. 116 Fed. Rep. 867; Kansas City, etc., R. Co. v. Flipppo, 138 Ala. 487; 35 So. Rep. 457; *contra*, Rio Grande So. R. Co. v. Campbell (Colo.), 96 Pac. Rep. 986; State v. Adams Exp. Co. 170 Ind. —; 85 N. E. Rep. 337; State v. Missouri Pac. Ry. Co. (Mo.) 11 S. W. Rep. 500. But see Blanchard v. Detroit, etc., R. Co. 139 Mich. 694; 103 N. W. Rep. 170; 12 Det. Leg. N. 30, and

Taylor v. Boston, etc., R. Co. 188 Mass. 390; 74 N. E. Rep. 591.

<sup>36</sup>Malott v. Hood, 99 Ill. App. 360; affirmed, 201 Ill. 202; 66 N. E. Rep. 247; United States v. Boston & Maine R. Co. (Appendix G, p. 350); United States v. Terminal, etc. (Appendix G, p. 325); Chicago, etc., R. Co. v. United States, 165 Fed. Rep. 423; United States v. Southern Ry. Co. (see Appendix G, p. 343); United States v. Atlantic Coast Line R. Co. (see Appendix G, p. 372); Wabash Ry. Co. v. United States, 167 Fed. Rep. — (decided February 3, 1909); see also Section 128, note 34, and Sections 163, 164.

## CHAPTER XI.

### REPAIRS.

#### SECTION.

- 155. Degree of diligence to make repairs.
- 156. Use of diligence to discover defects—Want of knowledge of defect.
- 157. Presumption—Diligence to discover defects and make repairs in transit.
- 157a. Distinction between an action to recover a penalty and to recover damages.
- 158. Cars in transit—Construction of statute.
- 159. Destination of car nearer than repair shops.
- 160. Repairing car in transit.
- 161. Repairs during journey.

#### SECTION.

- 161a. Establishing repair shops and material.
- 162. Knowledge of defect not an element of the defense.
- 163. Failure to provide or repair defective hand-holds.
- 164. Use of "shims"—Common law duty of master not applicable — Fellow servant's neglect—Construction of statute—Hand grips.
- 165. Repairing couplers—Other act of negligence aiding negligence with reference to couplers.
- 165a. Failure to equip train with air brakes.

§ 155. **Degree of diligence to make repairs.**—What degree of diligence is necessary in making repairs has been variously decided. Thus, in one case it was said: "The utmost diligence does not seem to have been used to discover and repair the defect in this car."<sup>1</sup> In another case the court said: "If diligence is to be recognized as a defense, certainly it must be the highest form of diligence. Without regard to what the rule of liability may be, the exercise of the greatest care in the matter of equipment and maintenance will keep coupling appliances in such condition as to exclude, except in very remote instances, the necessity of prosecutions for the enforcement of the act." The facts in this case, recited in the opinion, show why the court did not think a proper de-

<sup>1</sup>United States v. Louisville, etc., R. Co. 156 Fed. Rep. 193.

gree of diligence had been observed to discover the defect and repair it. The defect was occasioned by the loss of a clevis pin. "The car came to the Indiana Harbor Road," said Judge Landis, "from another carrier at a junction point. Here the defendant maintained a car inspector, who testified that, before cars were moved from there by his company, he 'customarily,' or 'usually,' or 'generally,' made an examination of the coupling apparatus, which examination consisted of looking at the coupler and lifting the lever. If such inspection disclosed no defect, the inspector passed the car, otherwise he made a record of the fact in a book kept for that purpose, and the repairs were made before the car was moved. The witness did not recall the particular car in question, but his book contained no record of the car, which indicated that his inspection showed the appliances to be in good condition. Even assuming the government's view of the law<sup>2</sup> to be wrong, the finding in this case must be against the railway company on the questions of fact. The distance traveled by the car over defendant's track was but a few miles. If, at the initial point, the pin had been in place and properly fastened, it is not probable that it would have been displaced by the ordinary handling of the car to destination. The fact that the pin was missing at the end of the journey is strongly indicative that the defect existed at the point of origin, that is to say, that the pin either was not then present, or was so badly worn or loosened, that proper inspection would have disclosed the fact." The court, therefore, ordered a decree entered against the railroad defendant thus found delinquent.<sup>3</sup>

**§ 156. Use of diligence to discover defects—Want of knowledge of defect.**—If a railroad company has properly

<sup>2</sup> "That it is no defense to a prosecution of this character that the carrier exercised diligence to provide and maintain its equipment with safety appliances, as required by the act."

<sup>3</sup> *United States v. Indiana Harbor Co.* 157 Fed. Rep. 565; see also *United States v. Atlantic, etc., R. Co.* (Appendix G, p. 372).

equipped its cars, still it will be liable if they become defective, thereby causing an injury; and it is no defense that the defendant company exercised reasonable care and diligence to discover and repair the defect before placing the car in service. "The statute says," said Justice Humphrey, "that common carriers shall not haul or use cars in a certain described condition. The defendant asks the court to hold, in effect, that they cannot haul the car in that condition, *provided*, that they have failed to use diligence to discover its defective condition, but that if they have used *due diligence* they may haul the car in its defective condition. In all such cases it would be impossible for the officers of the government to determine in advance whether a statute has been violated or not; but before a prosecution could be properly instituted they should go to the defendant company, ascertain what care it had used in regard to a certain car, determine as a matter of fact and law whether the acts of the defendant constituted *due diligence*, and from that determine whether a prosecution might be safely instituted. It is evident that such a defense would take the very life out of the act in question and render its enforcement impossible, except in a few isolated cases. The courts cannot, by judicial legislation, read into the act any language which will excuse offenders any more than they can read into it language which would increase their liability. Courts must enforce law as they find it. \* \* \* I have been unable to find that this character of defense has been sustained in any case which reached the courts of last resort. Counsel for defendant has not cited any authority in support of this doctrine of *due diligence* as a defense to a penal action. It is in the same category with the question of *intent* under the revenue laws and of *good faith* under statutes against handling adulterated goods, drugs, etc. It is certainly well established that the good intentions, or the lack of evil intent, on the part of a liquor dealer is no defense to a prosecution for the statutory penalty. If this is no defense in a *quasi* criminal action,

it certainly would be none in a civil action involving the same facts." "The propositions of law submitted by the defendant are, therefore, denied."<sup>4</sup> This case was approved in a subsequent case in which it was said: "The railroad companies are charged, as I have shown, with the duty of hauling only such cars as are provided with automatic couplers in suitable repair, so as to be operative without the necessity of employees going between the cars; and it would go far to subvert the law and the purpose thereof if they were permitted to say that they had no knowledge of the defect, and that, therefore, they were not liable under the act. The companies must ascertain for themselves and at their peril whether or not they have taken up or are hauling cars with defective couplers. Their intention to do right does not relieve them."<sup>5</sup> I hold, therefore, that want of knowledge of the defects on the part of the defendant company does not constitute a defense."<sup>6</sup> Under the recent decisions *knowledge* is not an element of the defense.<sup>6\*</sup>

<sup>4</sup>United States v. Southern Ry. Co. 135 Fed. Rep. 122.

<sup>5</sup>Citing United States v. Great Northern Ry. Co. 150 Fed. 229.

<sup>6</sup>United States v. Southern Pac. Co. 154 Fed. Rep. 897; United States v. Atlantic, etc., R. Co. 153 Fed. Rep. 918. This is now the rule of the majority of the cases, especially those of a recent date. United States v. Atchison, etc., R. Co. (Appendix G, pp. 299, 329, 333); United States v. Wabash R. Co. (Appendix G, p. 282); United States v. Atchison, etc., Ry. Co. 163 Fed. Rep. 517; United States v. Chicago, etc., R. Co. 163 Fed. Rep. 775; United States v. Baltimore, etc., R. Co. (Appendix G); United States v. Erie R. Co. 166 Fed. Rep. 352; United States v. Southern Ry. Co. Appendix G; Wabash R. Co. v.

United States, 167 Fed. Rep. — (decided February 3, 1909); Atlantic Coast Line R. Co. v. United States, 167 Fed. Rep. — (decided March 1, 1909); United States v. Atlantic Coast Line Co. (Appendix G, p. 372); Chicago, etc., R. Co. v. United States, 167 Fed. Rep. — (decided March 10, 1909); Chicago, etc., R. Co. v. King, 167 Fed. Rep. — (decided February 3, 1909). But see United States v. Illinois Cent. R. Co. (Appendix G, p. 376).

<sup>6\*</sup>United States v. Chicago etc., R. Co. 156 Fed. Rep. 180; United States v. Philadelphia etc., R. Co. (Appendix G, p. 315); United States v. Pennsylvania R. Co. (Appendix G, p. 321); United States v. Baltimore, etc., R. Co. (Appendix G, p. 357); United States v.

**§ 157. Presumption—Diligence to discover defects and make repairs in transit.**—Not at one are the courts with respect to the degree of diligence that must be exercised to discover defects in cars and make repairs. In some of the cases little or no excuse is accepted as a defense, even in a criminal case; while in others more leniency is shown, at least in criminal cases. Such a case is one that arose in the United States Court for the District of Nebraska. In that case the testimony showed that the defective car had at one time been equipped in the manner required by law, and the court declared that it could not presume that any part of the required equipment was imperfect when the alleged defective cars had, some time previously to the discovery of the defects, been started on their interstate journeys, for there was no evidence whatever as to the effect that the safety appliances were in any wise defective when they began their journey. "The presumption of innocence," said the court, "will leave no room for the inference that the cars were not properly equipped when that journey was begun, especially as no intelligent person can shut his eyes to the fact that the rapid motion, rough jostling and jolting of the trains, and their immense weight may at some time result in injury to such equipment. There cannot be much nicety in the movements of freight trains. The only offenses," continued the court, "imputed to the defendant in these cases is the use of the various cars at the times specified in the pleadings and covered by the evidence. Except these, no other offenses are charged or attempted to be proved. The testimony on behalf of the government shows that nearly every one of the cars had started from the initial point of their respective journeys at least one day, and usually longer, before the inspectors

Lehigh Valley R. Co. (Appendix G, p. 311.; United States v. Chicago, etc., R. Co. 162 Fed. Rep. 775; United States v. Erie R. Co. 166 Fed. Rep. 352.

The inspectors of the Government are not required to notify

the employes of the railroad company of defects on cars. United States v. Atchison, etc., R. Co. (Appendix G, pp. 299, 329, 333); United States v. Southern Ry. Co. (Appendix G, p. 367).

of the United States discovered the defects at some intermediate station. The testimony was very brief, and was directed altogether to what the inspectors then saw. No information was given which might enable the court to determine how long the defect existed. Obviously, under these circumstances, we could not conclude that any defects existed when the car started several days before. We must, on the contrary, presume that the defects were in some way caused during the long previous journey from the initial point to the point of discovery, and therefore, presuming that no violation of the act occurred until after the cars had left the original starting points, and having ascertained from the clear and explicit evidence offered by the United States that defects were found during the subsequent journey, we come to the point where our greatest difficulty begins. We should not lightly suppose that Congress intended, in case a properly equipped car started on its interstate journey with all the required safety appliances in perfect condition, but some part of which afterwards, in its rough and rapid journey, in some unknown way and at some time when the fact was practically, if not actually, undiscoverable, was broken or otherwise made defective, that the running of that car for the least distance under those circumstances should be held to be a criminal offense. Yet such is the contention for the United States, and it is true that the act, literally construed, would lead to that result and would embrace just such a case. To make crimes out of such inevitable, unavoidable, and unintentional acts, of the happening of which the carrier would usually be unconscious, would obviously be unjust and oppressive, and in a certain sense absurd for that reason. It would be shocking to any well-regulated moral sense to uphold the contention if only an individual citizen were involved, and as we know of no rule that differentiates one sort of person from another in the application of the rules of criminal law, we cannot willingly hold that such was the intention of Congress, even though the language used might

literally indicate it. We are not, however, permitted to depart from the words of the act of Congress, or to read exceptions into it, unless upon established principles of interpretation which would authorize it. Some departure from a literal construction may be admissible in this instance; but, if so, we must not only find the principles upon which that course may be justified, but also the points where we may begin and where we must end; and this, we think, has been done in the authorities we have cited. It was insisted on behalf of the government that the statute should be construed with the utmost strictness, and so literally as to make it a criminal offense under the statute if the car was used or operated for one moment, even at night, after the breakage of any part of the required equipment, even though such breakage occurred while the train was in rapid motion between stations, when it was impossible for anybody connected with its operation to ascertain the facts. In short the contention was that the act should be construed in the strictest and most literal manner, without regard to any other consideration whatever. If this contention be sound, nothing could be simpler, and the government was accordingly content to prove, as it did by two of its inspectors, that they passed alongside of the defendant's trains while at intermediate stations upon the several occasions involved and discovered the defects alleged in the respective paragraphs of the petition, and saw the cars proceed on their journey in that condition. It was also shown that this was done without in any wise informing any of the employes of the defendant of the defects. This was the course pursued in one instance at Fulton, Kentucky, where at least seven separate couplings had been ascertained to be out of repair in one train, although the defects may have endangered the lives of the crew in charge of that train during the trip to its destination, and although several of these defects could have been very easily repaired at that point if their existence had been disclosed. If the inspectors had pointed out the defects, and if those defects had not been



repaired before the cars were moved (if under the circumstances that were reasonably possible), the offense would certainly have been complete. And if the repairs had then been made the object of the law would have been accomplished, and the protection of the train hands would have been cared for so far as the safety appliances were concerned. The inspectors, however, seem to have thought it to be their duty to permit defectively equipped cars to move without giving any information that would have enabled the defendant to remove the dangers to the crew by supplying or repairing the defects. On the other hand, it was insisted that the statute should be so construed as not to visit criminal consequences upon a defendant in cases where it had started its cars with the proper equipment, but which, during the journey, had become deficient from unavoidable occurrences and under circumstances, where the discovery of needed repairs was in most instances impossible. It was urged that the construction contended for by the government would lead to gross injustice and oppression and to the absurd consequences of punishing one for a wholly involuntary act, the doing of which could not be discovered until a greater or less time had elapsed after the offense had been completed. The defendant accordingly, while complaining of the impossibility of being able to show the exact facts at all times in reference to the innumerable couplings and handholds on the vast number of cars hauled, offered evidence tending to show that it had inspected all its cars; that it had not discovered the defects alleged, unless in one or two instances, in which the cars had to be moved short distances in order to reach a point where repairing was possible. And thus we are brought to the question whether, if safety appliances, which are in good condition when the journey of a car on which interstate traffic is being carried begins, afterwards, without the knowledge of the carrier, get broken or otherwise out of repair, it is sufficient proof of the violation of the law to show that fact simply, without showing also that the defendant had learned of the defect or had had reasonable opportunity to do so.

Manifestly the act does not contain any words implying that the use of the car without the required safety appliance equipment shall be with intent to violate the statute, or be knowingly and willfully done; nor, indeed, does the language make any exceptions where an unavoidable accident impairs or destroys the operative powers of any of these appliances while the train in which the car is placed is moving on its journey. Speaking generally, the rule is that in such cases we cannot by construction take from nor add to the language used by Congress, but what we are to ascertain in these cases is, not what general rules require, but whether there are any exceptions to those rules, and, if any, what they are. The authorities we have cited seem clearly to show that, if a strict and literal construction would lead to manifest injustice and oppression then the language used should be so construed as to avoid those results. The defendant is a common carrier, engaged in the performance of important duties to the public, involving great and various obligations, to which it is strictly held. For the most part the several things alleged against it in these cases, were the result of what had occurred while its trains were in motion between stations on its railroad. Those occurrences were practically inevitable in the ordinary operation of its trains. It was impossible to avoid them, or to know of them until long afterwards; and, however it may strike others, in the opinion of this court it would obviously be unjust and oppressive to so construe the Safety Appliance Act or to make such occurrences criminal offenses under its provisions, unless the defendant had reasonable opportunity to learn of them before it afterwards used the car in hauling interstate traffic. For this reason the court readily yields to those rules of construction fixed by the Supreme Court in the cases cited,<sup>7</sup> and by which it can properly construe the acts

<sup>7</sup> *Huntington v. Attrill*, 146 U. S. 657; 13 Sup. Ct. Rep. 224; 36 L. Ed. 1123; reversing 70 Md. 191; 2 L. R. A. 779; 14 Am. St. Rep. 344; 16 Atl. Rep. 651; *Johnson v. Southern Pac. Co.* 196 U. S. 1; 25 Sup. Ct. Rep. 162; 49 L. Ed. 363; reversing 54 C. C. A. 508; 117 Fed. Rep. 462; *United States v. Lacher* 134 U.

upon canons of interpretation which justify and demand the limitation of its general language within the bounds we shall indicate. In support of these respective contentions several opinions were cited upon the one side or the other.\*

\* \* \* While we have been instructed by those cases, we have preferred to look at the question now in litigation from a point of view somewhat different, and, without going into much elaboration, will state the conclusions reached. It probably in this connection should not be forgotten that the Safety Appliance Act was intended to promote the safety of the very men who are in charge of the trains—men whose duty and interest require them to discover any breakage or defect that might occur; and, if they could not do so, it seems to the court that the literal construction contended for upon the part of the United States would not be a sensible construction, but would work out, probably in most instances, the palpably unjust and oppressive result of inflicting a punishment for an unavoidable act of which the offender was at the time of its commission necessarily unconscious and with-

S. 629; 10 Sup. Ct. Rep. 625; 33 L. Ed. 1080; *Carlisle v. United States*, 16 Wall. 153; 21 L. Ed. 426; reversing 6 Ct. Cl. 398; *United States v. Bell Telephone Co.* 159 U. S. 548; 16 Sup. Ct. Rep. 69; 40 L. Ed. 225; *Mottley v. Louisville, etc., R. Co.* 150 Fed. Rep. 406; *The Burdett*, 9 Pet. 690; *Chaffee v. United States*, 18 Wall. 545; 21 L. Ed. 908; reversing Fed. Cas. No. 14,774; *Clyatt v. United States*, 197 U. S. 207; 25 Sup. Ct. Rep. 429; 49 L. Ed. 726; *Kirby v. United States*, 174 U. S. 55; 19 Sup. Ct. Rep. 574; 43 L. Ed. 809; *Agnew v. United States*, 165 U. S. 50; 17 Sup. Ct. Rep. 235; 41 L. Ed. 624.

\* These were *United States v. Southern Ry. Co.* 135 Fed. Rep. 122; *United States v. Pittsburgh,*

*etc., Ry. Co.* 143 Fed. Rep. 360; *United States v. Northern, etc., Co.* 144 Fed. Rep. 861; *United States v. Indiana, etc., R. Co.* 156 Fed. Rep. 565; *United States v. Chicago, etc., R. Co.* 156 Fed. Rep. 180; *United States v. Great, etc., Ry. Co.* 150 Fed. Rep. 229; *United States v. Southern Pac. Co.* 154 Fed. Rep. 897; *United States v. Atchison, etc., Ry. Co.* 150 Fed. Rep. 442; *United States v. St. Louis, etc., R. Co.* 154 Fed. Rep. 516; *Voelker v. Chicago, etc., Ry. Co.* 116 Fed. Rep. 867. "And the same case in the Circuit Court of Appeals. One of these cases, it will be noted was an action for damages by an individual, and the other was for the enforcement of the criminal provisions of the statute."

out any sort of intention of doing a wrong. As Congress must be presumed not to have intended such a result, we should hold that it did not intend to punish the unavoidable and unconscious doing even of an otherwise unlawful act. This view is emphasized by the obvious facts that trains, especially on single-track railroads, could not, without great danger to the traveling public, stop between stations to readjust or put on, for example, a new handhold, or a new pin or clevis, on some car in a freight train, even if the defect were discovered; that in respect to automatic couplers no very great danger to train hands could arise until a point is reached where coupling or uncoupling would be necessary; and that the carrier's duty to the general public should not altogether be forgotten. We cannot resist the conviction that the most urgent insistence upon a literal construction of the statute would balk in a case where a train running at speed between stations in some way broke some part of the safety appliance equipment. The literal interpretation contended for by the counsel for the United States demands, and counsel insists upon, the conclusion that, if the train proceeds at all for any distance (even the shortest) after the break occurs, the offense is complete, and that it is not for the courts to say that an offense has not been committed, but that it is for the executive officers to decide whether the government will overlook the offense or prosecute it. The courts, however, if appealed to, could hardly yield to a view which would exclude them from the function and the duty of passing upon the proper meaning of the act, and determining for themselves whether a person accused was guilty of a public offense; and in the exercise of that duty they can scarcely fail to say that common sense demands some relaxation from a literal construction in the case supposed. If we relax from it at all, we logically surrender it altogether, and thenceforward our labors must be directed to finding the exact point where we may begin and where we may end in order to reach a sensible and just conclusion as to what should be done in such cases. That some relaxation from the literal construction

contended for is unavoidable, is clear, and we think we may best interpret the intention of Congress by holding that the carrier should be made liable when it is shown that a safety appliance equipment has become deficient and inoperative after the interstate journey of the car had begun, if it does not supply the deficiency at the first opportunity after it is actually discovered, or after its discovery could have been made by the use of the utmost care that a highly prudent man would use under the circumstances of the case. The determination of the question of that degree of care would, of course, in some instances, depend upon complex conditions; but the necessity for its determination would seem to be unavoidable, unless we are to have a too literal or a too loose construction of the act in applying it to practical affairs in which the great questions of human safety and necessary business are alike involved. This view seems to the court to approximate as nearly as possible the presumed purpose of Congress to punish intentional or avoidable acts, and not those which were unknown and absolutely unavoidable when they occurred. To impute to Congress an intent to do the latter, would seem to be inadmissible, though we should probably punish in every instance where any deficiency in safety appliances existed when the car was started on the interstate journey. At that point, knowledge of the defect could in most, if not in all, cases be discovered. But, if the operative functions of such appliances become defective during that journey, then punishment as for a criminal offense should only be visited upon the carrier in cases where he, by the use of the utmost degree of diligence which would be used by a highly prudent person under the circumstances, could have discovered and repaired the defect. A less stringent rule should not, we think, be tolerated. Assuming, as we must from the evidence and legal presumptions, that each of the offenses alleged in these cases was committed, if at all, while the car was upon an interstate journey, and not before such journey began, we think the government, in order to be entitled to recover the prescribed penalty for

the offense, must by the evidence show to the exclusion of reasonable doubt the following facts: *First*, that the car was used in hauling interstate traffic; *second*, that when so used the car was either not equipped or provided with the required safety appliances at all, or else that some part of those appliances had become inoperative; and, *third*, if, as must be presumed was the case with most of the cars now involved, those appliances were all in good order and condition when the car was originally started on its interstate journey, and afterwards became defective during the transit, then, in order to convict, the evidence must show to the exclusion of reasonable doubt that the alleged defects had respectively been either in fact discovered by the carrier or else that they could have been discovered and corrected by it by the exercise of the utmost degree of care and diligence which could be expected at the hands of a highly prudent man under similar circumstances.”\*

**§ 157a. Distinction between an action to recover a penalty and to recover damages.** In a recent case in the Circuit Court of Appeals for the Sixth Circuit a distinction has been drawn between an action to recover damages for an injured employe occasioned by lack of proper equipment and one to recover a penalty for the government, with respect to a car becoming defective during its transit. In a case of a prosecution to recover a penalty the rule is laid down that if the railroad company has used the utmost diligence in having a defect corrected it is excused and not liable to the penalty.\*\*

**§ 158. Cars in transit—Construction of statute.**—A similar view was taken in another case. Said the court: “The first rule of construction which occurs to us is that we are to have regard to the scope and purpose of the statute, not so much the general purpose, as the immediate purpose of

\* *United States v. Chicago, etc.,*  
R. Co. 156 Fed. Rep. 182.

\*\* *United States v. Illinois Cen-*  
*tral R. Co. (Appendix G, p. 376).*

this particular enactment. For, if we look too intently upon some ultimate good we would wish to accomplish, we are very liable to distort the law or make out of it some other enactment than that which the legislature has in fact passed. We think the immediate purpose of Congress in this enactment, in the respect we are now considering it, is that disclosed by its title, wherein it is declared to be 'An act to promote the safety of employes and travelers upon railroads, by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers, etc. The general purpose is to promote the safety of employes and travelers; but the immediate purpose of the act is to prescribe a way of doing this, namely, by compelling common carriers to equip their cars with automatic couplers. The method or means by which the ultimate good is expected to be accomplished is the subject of the enactment. The safety of the employes, etc., is a thing beyond an expected result of the enactment, which latter is the substantive thing before us for interpretation. True, we should have regard to the result intended for it, but we cannot carry into it words foreign to its meaning, or strain those used beyond their fair import." "When we come to the enactment itself we find that in the second section it corresponds with what the title has heralded. It forbids the use of cars which have not been equipped with automatic couplers, which are a little more fully defined by adding that they are to be such as will obviate the necessity of going between the cars to uncouple them, or, as we are disposed to think, couple them. And this is all there is of the statute which by direct language imposes the duty upon the carrier in respect to the use of automatic coupling. But it is necessarily implied that the railroad company shall keep up the equipment, for it forbids the use of the cars without it. In this connection it seems proper to refer to the last clause in section 2 which is: 'And which can be uncoupled without the necessity of men going between the ends of the cars.' We understand this to be a part of the description of the type of the automatic

couplings with which the cars must be equipped. And further, we may here remark that the coupling with which this car was equipped was of the kind required by the act. Section 6 declares that the use of any car in violation of this provision of the act shall constitute an offense punishable by a fine of \$100. And Section 8 declares that the employe shall not be deemed to have assumed the risk occasioned by the failure of the railroad company to equip its cars as required by the second section. Now, the statute clearly and positively devolves upon the railroad company the duty of equipping its cars with those couplers, and makes it a penal offense to use its cars without them. All this is simple enough. The company could make no mistake about it. But we can find no warrant for imposing such drastic consequences upon the failure of the railroad company to at all times and under all circumstances have the couplings in repair. One of the recognized rules of construction of statutes is that we are to look to the state of the law when the statute was enacted in order to see for what it was intended as a substitute, and another is that it is not to be presumed that the statute was intended to displace the former law, whether it be statute or common law, further than was fairly necessary to give it place and operation. Now, prior to this enactment, other methods were employed by railroad companies for coupling their cars—generally, if not universally, by a link and pins. And the law was that in respect of this coupling the company was bound to exercise that reasonable degree of diligence in keeping them in repair which was proportionate to the danger of their use. The rule was expressed in various forms, but that was the substance. Conceiving that the new form or method of automatic coupling by impact would mitigate the danger to employes, Congress enacted this statute to compel the carrier to substitute the new form for the old in operating its cars; and, of course, it is necessarily implied that it shall be done in good faith as is always implied in the enactment of laws. If the carrier does this, it has complied with the requirement of the stat-



ute, and the old method is displaced by the new. But it is now proposed to add to the obligation of the carrier by requiring that he shall be bound to see that the substituted coupling shall at all times and places be in good order, a burden well nigh to impossible. The coupling apparatus on railroad cars is subject at all times while they are being operated, to almost constant wrench and strain and liability to breakage. Much of the time the cars are connected up in trains running on the time schedules, and under orders of train dispatchers which must be observed, or fatal and disastrous consequences ensue. Moreover, accidents to the couplings or unknown defects appear at places more or less remote from repair shops. It is reasonable and just to require that the carrier should exercise a high degree of care to keep the couplings in proper condition. But it seems unjust and unreasonable to say that having fulfilled its utmost duty in this regard, it should be held responsible for conditions which may occur without its fault. We do not say that Congress has not the power to impose such an obligation as it is contended this statute imposes but what we mean to say is that if a statute seems to impose obligations so extraordinary and difficult to perform the courts would be bound to see whether the language employed is not susceptible of a more reasonable construction. Undoubtedly there are many cases in the multitude of statutes where the command is so imperative and unconditional that there is no escape from an exact and literal observance. The industry of counsel has accumulated a considerable number of them in his brief. In such cases if the statute is within the power of the legislature, there is, as the phrase goes, 'no room for construction,' and the business of the court is simply to administer the law as it is written. But this in no wise relieves the court from the duty of construing statutes which are not of that character, but are subject to the amelioration which the common law affords by its rules of construction. But with regard to this statute, on turning back from the considera-

tion of the consequences to the language employed, we find nothing which in terms imposes such an obligation. It is said to be implied; and the singular result is that instead of shading down the express language of an act so that it shall not have an effect which we cannot suppose to have been intended by the legislature, we should by implication infer an intent which, if seemingly expressed, we should be bound, if fairly possible, to suppose did not exist. Then, again, the statute is penal. The facts which would be necessary to maintain a criminal prosecution are the same as those which would support a private action. The only difference would be in the greater certainty with which the facts should be proven. And in the construction of such statutes the court is not justified in extending their operation beyond the plain meaning of the language used into regions of doubt and uncertain implications. In this case we do not think it could be held as matter of law that the railroad company was guilty of a violation of the statute. In view of the evidence given at the trial, it was a question for the jury to determine as one of fact whether the railroad company should, if it had used reasonable diligence, have put the coupling in repair before the accident happened."<sup>10</sup> It is urged that, if

<sup>10</sup> "As we have said, questions have heretofore arisen in the courts upon the construction and application of this statute, among them the question most fully considered here; and there is some conflict in their decisions. In *United States v. Atchison, etc.*, R. Co. 150 Fed. Rep. 442; *Voelker v. Chicago, etc.*, Ry. Co. 116 Fed. Rep. 867; *United States v. Illinois Cent. R. Co.* 156 Fed. Rep. 185; *Elmore v. Seaboard Air Line R. Co.* 130 N. C. 506; 41 S. E. Rep. 786, and *Missouri Pac. Ry. Co. v. Brinkmeier* (Kan.) 93 Pac. Rep. 621; 50 Am. & Eng. R. Cas. 441; similar views in regard to this statute to those we have indicated as

our own were expressed. It is proper to observe that the views of Judge Shiras in the *Voelker* case, 116 Fed. Rep. 867, are not there so clearly stated as in his charge to the jury printed in the record of that case, with which we have been supplied. Opposed to those decisions are the views expressed in *United States v. Southern Ry. Co.* 135 Fed. Rep. 122, by Judge Humphrey; by Judge Whitson in *United States v. Great, etc.*, Ry. Co. 150 Fed. Rep. 229, and possibly for the Circuit Court of Appeals for the Eighth Circuit, in *Chicago, etc.*, Ry. Co. v. *Voelker*, 129 Fed. Rep. 522; 65 C. C. A. 226; 70 L. R. A. 264, where the

the courts fail to give the statute the construction that it imposes an absolute duty, it defeats the purpose of Congress in enacting it, and leaves the obligation of the carrier as vague as before. But we see no reason for this contention. The benefit of the equipment of the cars with that kind of 'safety appliances' and the maintenance thereof, which, as we think, was the purpose of the law, is secured. The question about which the difference arises is simply whether, in addition to supplying and maintaining the appliances, the carrier is absolutely bound to insure their constant good order, or whether it is bound only to the extent of its best endeavor. The question whether it has fulfilled its duty in the latter respect is no more difficult of determination than such as are constantly arising in cases where negligence is charged in other conditions."<sup>11</sup>

court was reviewing the ruling of Judge Shiras in 116 Fed. Rep. 867, *supra*. We say 'possibly,' because there are several reasons for thinking that the Court of Appeals did not intend to decide anything to the contrary of the construction of the statute which we approve. There were two counts in the petition; one upon the statute, and the other upon the common law liability for negligence. Upon the first count the court below had charged the jury in respect to the statutory liability in accordance with the view we take of it, and the Circuit Court of Appeals affirmed that ruling. It appears from the report that the railroad company made three points for reversal, neither of which presented the question here presented. The court negatived each of them, and naturally did not go into questions not raised. It reversed the judgment upon another ground. It seems obvious enough that it is not an adverse decision. If we had

thought it otherwise, we would have more anxiety about the correctness of our view. Judge Humphrey expressed an adverse opinion, but he finally rested his judgment upon another ground. But Judge Whitson cited Judge Humphrey's opinion, and adopted the view which had been expressed by him but not made the final ground of decision."

"St. Louis, etc., R. Co. v. Delk, 158 Fed. Rep. 931.

If appliances are at hand so that they can be readily made, repairs must be at once made. "But if such means and appliances were not at hand to so remedy the said defects, the defendant would have the right, without incurring the penalty of the law, to have such cars upon which said air brakes so became defective or inoperative hauled to the nearest repair point on its line of railroad where such defects could be repaired and the cars and air brakes put in operative condition; but if such defects

**§ 159. Destination of car nearer than repair shop.—**

Where the destination of a car was nearer than the repair shops, to which, in order to repair it, it was necessary to take the car, it was held that the company was not bound to take the car to the repair shops to repair its coupler before delivering it at its destination, having it unloaded, and then take it to the shops. "The court thinks that the testimony fails to show beyond a reasonable doubt the existence of every element necessary to constitute the offense alleged in the petition, within the true intent and meaning of the act of Congress, and will, therefore, find and adjudge that the defendant is not guilty as charged in the petition. And any other result would be obviously unjust and oppressive, and not warranted, we think, by any sensible construction of the statute. The only use of the car by the defendant was to get it as speedily as possible off the busy track and to the place where the defects in the coupling could be supplied. Unloading it at Ewald's<sup>12</sup> was an incident in the accomplishment of this object. No course could well have been more reasonable under the circumstances than the one pursued, and there was no testimony offered by the government tending to show that such defects could practically have been remedied away from repairing points. It was not the case of a handhold merely, as to which the case of putting one on is obvious."<sup>13</sup>

**§ 160. Repairing cars in transit.—**If the couplers are capable of repair, in respect that the law requires, without the necessity of taking them to the repair shops, they must

existed at a repair point or other place where they could be repaired, as before stated, then if the defendant ran the train from such place when 75 per cent. of the cars therein were not so equipped with operative air brakes as required by law, it is liable for the penalty of \$100 for so running such train." *United States v. Chicago, etc., R.*

*Co. 163 Fed. Rep. 775; United States v. Atchison, etc., R. Co. (Appendix G, pp. 299, 329, 333); United States v. Southern Pac. Co. (Appendix G, p. 367).*

<sup>12</sup> The place of its destination, a yard in the same city with the repair shops.

<sup>13</sup> *United States v. Louisville, etc., R. Co. 156 Fed. Rep. 125.*

be then repaired "before moving the cars farther upon their journey. I say farther upon their journey," because the cars were yet in transit; the point of destination had not been reached, nor was it reached until they were set in at the place of unloading. The chain coupling, the lock pin with the lever, is a very simple device, consisting of a few links of a small chain, easily attachable with the aid of light tools, and there exists no reason why it should not be readily repaired or replaced at any stage in the journey without serious or material inconvenience or delay. In discussing this phase of the question, Judge Wolverton of the District Court for the District of Oregon said: 'But if I am in error as to the fact of the readiness with which the repairs can be made, then the other phase of the question arises, which is, whether the cars should have been taken to the car shops for repair before being carried on the terminal yards for unloading. It is urged that the court should take into consideration the convenience and practicability of repairing the defects. To be understood, it should be said that the term impracticable is not employed in the answer to indicate that it was impossible to set the cars out and take them to the repair shops before carrying them on their journey, but that it was impracticable so to do in the sense that it would unduly impede and interfere with the transportation of freight by cars, and in special instances might result in loss to either the shipper or carrier, or to both, as in the case where perishable goods were being transported. While Congress may have taken into consideration, and presumably did, the inconvenience to railroad companies in providing equipment of the character here under consideration, and in keeping the same in repair, yet by its positive enactment it manifestly considered the safety of the brakeman and employes who are charged with the duty of coupling and uncoupling cars paramount; and, having made no exception in terms, the natural conclusion is that the act was intended to apply in all cases where the cars were being used in moving interstate traffic. Admittedly, if a breakage occurs between

stations where repair shops are located, and the repair cannot be made without taking the car to such a place, the company cannot be held liable until it has had the opportunity of making the repair, and in that event it would be justified in hauling the car in the train to the succeeding station where such repairs could be made. This does not, however, give to the company the discretion of carrying the car forward to repair shops at destination. If it were permissible to carry the car by one repair shop to another, where the repair could be more conveniently made, then it could, with equal propriety, be claimed that the car might be carried by and beyond two or more of such stations, and, indeed, to cover an entire journey from the Middle West to the Pacific seaboard. This would detract vitally from the utility of the law, as brakemen might, in the course of such a haul, be required to pass many times between the cars for the coupling and uncoupling of the particular car or cars with defective equipment. An illustration is afforded by what was done in this case. After the cars were taken into the terminal yards, it was necessary to uncouple them to set them out for unloading and to couple them again for transportation to the Southern Pacific Company's car shops, with possible other couplings and uncouplings to be made. So that the danger to the brakeman continued, and must needs have continued, until relieved by the proper repairs being made. I am constrained to the view, therefore, that this is just the danger that Congress intended to relieve against by the adoption of the act, and that it is what the defendant's duty required it to relieve against by making the repair of the defects prior to taking the cars into the terminal company's yards. The shortness of the haul does not alter the case. We may suppose that a defect existed while the car was being carried from beyond the Dalles, where the Oregon Railway & Navigation Company has repair shops. It would have been a violation of the act for that company to have hauled the cars from the Dalles to Portland without correcting the defect; and so it is, in like manner, a violation of the act for the

Southern Pacific Company to take up the cars at East Portland and haul them for the distance of only a half mile, and there deliver them to a company whose duty it is to transact terminal business, where the chief work is in shifting cars from one train to another, and a vast amount of coupling and uncoupling is done, and the greatest danger is present. To hold otherwise would defeat in large measure the paramount purpose and object of the law. The demurrers to the answers should, therefore, be sustained, and it is so ordered.”<sup>14</sup>

**§ 161. Repairs during journey.**—Whenever repairs can be made (or at least can be reasonably made according to the reasoning of some of the cases) during the journey they must be so made; but if they cannot be so made, then they must be done at the nearest repair shop.<sup>15</sup>

**§ 161a. Establishing repair shops and material.**—“It is certainly reasonable that a railroad company should be required to maintain shops or repair material and make inspections and repairs at places within reasonable distance of each other; that in establishing such repair points the company has the right, in the ordinary operation of their trains between those repair points, when a train is in operation and defects arise reasonably to carry the car the appliances on which are broken or defective to the first repair point, but they do not have the right, having carried it to that point, to take it beyond that point without discovering and making the necessary repairs to those safety appliances attached to that car, and if they do carry it beyond that point, they are liable to the penalty provided by this law.”<sup>16\*</sup>

<sup>14</sup> United States v. Southern Pac. Co. 154 Fed. Rep. 897. See also United States v. Atlantic Ry. Co. 153 Fed. Rep. 918.

<sup>15</sup> United States v. Southern Pac. Ry. Co. 154 Fed. Rep. 897; United States v. Chicago, etc., Ry.

Co. 149 Fed. Rep. 486; Chicago, etc., R. Co. v. King, 167 Fed. Rep. — (decided February 3, 1909).

<sup>16\*</sup> United States v. Baltimore, etc., R. Co. (Appendix G, p. 357); United States v. Chicago, etc., R. Co. 162 Fed. Rep. 775; Chicago,

§ 162. **Knowledge of defect not an element of the offense.**—It has been held that knowledge of the defective coupling is not an element of the offense. In a charge to the jury, Judge Munger of the United States Court for the District of Nebraska, said: "There is considerable contrariety of opinion between the different courts as to the proper construction of this act. I have reached the conclusion that knowledge is not an element of the offense under the statute. The chief purpose of the act of Congress, as pronounced by the various courts that have passed upon it, was the protection of the lives and the safety of the trainmen who have occasion to pass between the cars or to work in and about them, and the act should be construed so as to give this intent full force, if such a construction can be given to the act without doing violence to the language. Any other construction than this requires, not only that the carrier should fail to have the cars properly equipped, but also that the defect should have existed for such a length of time as would reasonably allow the presumption of inspection and notice on the part of the carrier. That interval would then depend upon the verdict of the jury in each instance—in some cases it might exist only for an hour; in other cases it might exist for days, or for a sufficient number of hours to move from one inspecting station on the railway to another inspecting station. This construction of the act concludes that Congress did not intend to protect the lives or provide for the safety of a train crew during such period as the jury should find would be sufficient for the company in the ordinary method of doing business to discover and remedy this defect. This seems to me an unreasonable construction. If the offense that is specifically charged here depends upon its being knowingly committed, it would seem that under each section of this act, in order to render a railway guilty of non-compliance, such an offense should be knowingly committed,

etc., *R. Co. v. United States*, 165 Southern Pac. Co. (Appendix G, Fed. Rep. 423; *United States v.* p. 367).



and that leads to what seems to me an absurdity. For instance, the fifth section of the act requires that the standard height of the draw bar above the top of the rails is to be fixed at a certain distance, from which distance a maximum variation is allowed. If the act is not violated when there is a variation within that maximum distance then it would appear that if there is an additional variation of another inch, or 2 or 3 inches, not knowingly allowed, and there has been ordinary care and diligence used, no offense is committed under this act. By the same process of reasoning under Section 2 of the amended act, it would not be a violation of the law to have less than the designated percentage of cars operated by power brakes, but such less percentage must be known to the company."<sup>16</sup> "While the decision in the case of the *United States v. A., T. & S. F. R. R.* (D. C.)<sup>17</sup> is to the contrary, yet it seems to me that, Congress having the power to make certain acts an offense regardless of knowledge, and having failed to make knowledge an element by express words in this act, it must have been within the contemplation of Congress that accidents were liable to occur between stations and for some time before repairs could be made, and that, therefore, the failure to include knowledge as an element of the offense must have been present in the mind of the enacting body. Its omission was intentional in order that this statute might induce such a high degree of care and diligence on the part of the railroad company as to necessitate a change in the manner of inspecting appliances, and to protect the lives and the safety of its employees, provided the accident

<sup>16</sup> "I find upon an examination of the opinions cited in the argument that there have been decisions by a number of courts, all holding, in effect, that knowledge and diligence are not ingredients of the offense. *United States v. Southern Ry. Co.* (D. C.) 135 Fed. 122; *United States v. C. M. & St. P.*

*Ry. Co.*, 149 Fed. 486; *United States v. G. N. Ry.* (D. C.) 150 Fed. 229; *United States v. S. P. Ry.* (D. C.) 154 Fed. 897; *United States v. Atlantic, etc., Ry.* (decision by Judge Purnell, May 11, 1907) 153 Fed. 918."

<sup>17</sup> 150 Fed. Rep. 442.

occurs from a defective appliance such as is designated in this act." <sup>18</sup>

§ 163. **Failure to provide or repair defective handhold.**—A car came into the company's yards without a grab iron on its right hand side of the end on which the brake-staff was located, known as the "B" end.<sup>19</sup> A grab iron had been upon the car. In that condition, on the day of its arrival, the company hauled it to other yards and delivered it to a connecting carrier in that condition. It was loaded during this time with interstate traffic. The company had facilities for repairing it both at its yards and when it inspected it, but failed to put on another grab iron. It was held that the company had violated the statute in not using the proper degree of diligence to make the repairs. It was said that the grab irons were used in the yards where switching was done.<sup>20</sup> Secure grab irons or handholds must be put on the end of a car where they are reasonably necessary in order to afford men coupling or uncoupling cars greater security than would be afforded them in the absence of any grab irons or handhold at that point; but if some other appliance, such as a ladder or brake lever, which afford equal security with the grab irons is there, the statute has not been violated. Having something at that point which performs all the functions of a grab iron is the same as having what is properly called a grab iron there.<sup>20\*</sup>

<sup>18</sup> *United States v. Chicago, etc.*, R. Co. 156 Fed. Rep. 180. See case under note 6\*.

The case of *United States v. Atlantic, etc.*, R. Co. 153 Fed. Rep. 918, did not adopt the doctrine of this case; but held that the purpose of the statute was to make the railway company unconditionally liable for a violation of the statute.

<sup>19</sup> The opposite end is known as "A" end. This is in accordance

with the American Car Builder's rules. If there be two brake-staffs upon the same car, the end toward which the cylinder push rod travels is known as the "B" end.

<sup>20</sup> *United States v. Louisville, etc.*, R. Co. 156 Fed. Rep. 193.

<sup>20\*</sup> *United States v. Boston, etc.*, R. Co. (Appendix G, p. 350).

As the law does not define a handhold, it is for the jury to determine whether a car is equipped with proper hand-holds or with

**§ 164. Use of "shims"—Common law duty of master not applicable—Fellow servant's neglect—Construction of statute—Hand grips.**—In discussing the effect of this statute upon the duty of a railroad to its employes and the use of "shims" to raise and lower the draw bar to the legal height, the Supreme Court of the United States said: "The evidence showed that draw bars which, as originally constructed, are of standard height, were lowered by the natural effect of proper use; that, in addition to the correction of this tendency by general repair, devices called shims, which are metallic wedges of different thickness, are employed to raise and lower draw bars to the legal standard; and that in the caboose of this train the railroad furnished a sufficient supply of these shims, which it was the duty of the conductor or brakeman to use as occasion demanded. On this state of the evidence the defendant was refused instructions, in substance, that if the defendant furnished cars which were constructed with draw bars of a standard height, and furnished shims to competent inspectors and trainmen and used reasonable care to keep the draw bars at a reasonable height, it had complied with its statutory duty, and, if the lowering of the draw bar resulted from the failure to use the shims, that was the negligence of a fellow servant, for which the defendant was not responsible. In deciding the questions thus raised, upon which the courts have differed,<sup>21</sup> we need not enter into the wilderness of cases upon the common law duty of the employer to use reasonable care to furnish his employe reasonably safe tools, machinery and appliances, or consider when and how far that duty may be

such suitable substitutes as will give to the employees greater security in the coupling or uncoupling of cars. *United States v. Baltimore, etc., R. Co.* (Appendix G, p. 357.) See Sections 154, 163.

Where the charge is that the *chains connecting the lock pins or lock blocks* with the uncoupling

lever were out of repair, it is immaterial whether the chains were broken actually in the links or were disconnected. *United States v. Terminal Assn.* (Appendix G, p. 325. See *United States v. Denver, etc., R. Co.* 163 Fed. Rep. 519.

<sup>21</sup> Citing *St. Louis, etc., Ry. v. Delk*, 158 Fed. Rep. 931.

performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common law duty of master and servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one and never should be heeded when the hardship would be occasioned and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of the law. But when applied to the case at bar

the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employe and of the public. Where the injury happens through the absence of a safe draw bar there must be hardship. Such an injury must be an irreparable misfortune to some one. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended and to seek some unnatural interpretation of common words. We see no error in this part of the case."<sup>22</sup>

**§ 165. Repairing couplers—Other act of negligence aiding negligence with reference to couplers.**—It is the duty of a railroad company after it has equipped the cars to keep them in repair. It may be negligent in this respect and become liable to the employe. "The statutory requirements," said Judge Shiras, "with respect to equipping cars with automatic couplers was enacted in order to protect railway employes, as far as possible, from the risks incurring when engaged in coupling and uncoupling cars. If a railway uses in its business cars which do not conform to the statutory requirements, either because they never were equipped with automatic couplers, or because the company, through negligence, has permitted the coupler, originally sufficient, to become worn out and inoperative, then the com-

<sup>22</sup> *St. Louis, etc., Ry. Co. v. Taylor*, 210 U. S. 281; 28 Sup. Ct. Rep. 616; 52 L. Ed. 1061.

pany is certainly not performing the duty and obligations imposed upon it by the statute and is, therefore, chargeable with negligence in thus using an improperly equipped car; and the company is bound to know that if it calls upon one of its employes to make a coupling with a coupler so defective and inoperative that it will not couple by impact, and that, to make the coupling the employe must subject himself to all risks and dangers that inhered in the old and dangerous link-and-pin method of coupling, it is subjecting such employe to the very risk and danger which it is the purpose of the statute to protect him against, so far as it is reasonably possible. Subjecting an employe to risk life and limb by calling upon him to use appliances which have become defective and inoperative through the failure to use proper care on part of the master is certainly negligence, which will become actionable if injury results therefrom to the employe, and liability therefor cannot be evaded by the plea that if the company was thus guilty of actionable negligence in this particular it cannot be held responsible therefor because it was guilty of another act of negligence which aided in causing the accident." <sup>23</sup>

**§ 165a. Failure to equip train with brakes.**—It is the duty of a railroad company to ascertain at its peril that a train it hauls, whether its own train or one received from another company, over its line of railway, or any part of it, that at least seventy-five per cent of the cars of the train are equipped with air brakes, and if that percentage of its trains be not so equipped, it is liable for a penalty of one hundred dollars because of its hauling such train, the penalty being for hauling the train and not a penalty for each insufficiently equipped car. The seventy-five per cent of the cars composing the train must be so equipped with air brakes that they can be operated by the engineer of the train, and if upon the journey they are reduced below that percentage, then it is the duty of the company to immediately

<sup>23</sup> Voelker v. Chicago, etc., Ry. Co. 116 Fed. Rep. 867.

repair the defect or defects and put the air brakes in operative condition as soon as the defects are discovered, or can be discovered by the exercise of reasonable care, at least, on the part of the agents and servants of the company charged with that duty, if the defects can be so repaired by the means and appliances at hand for that purpose when the defects are discovered. If the means and appliances are not at hand to remedy the defects, the company has the right, without incurring the penalty of the law, to haul the defectively equipped car to the nearest point on its line where the defects can be repaired and the air brakes and cars put in operative condition, but if the defects exist at a repair point or other place where they can be repaired, then if the company run its train from that place when seventy-five per cent of the cars in the train are not equipped with operative air brakes it will be liable for the penalty of one hundred dollars for so running the train.<sup>24</sup> In counting the cars in a train to be equipped with air brakes, the engine and tender are to be counted as separate and distinct cars.<sup>25</sup> The Interstate Commission has increased the number of cars to be equipped in any train to seventy-five per cent of the entire number in the train.

<sup>24</sup> United States v. Chicago, etc., R. Co. 162 Fed. Rep. 775.

<sup>25</sup> United States v. Chesapeake & Ohio R. Co. (Appendix G, p. 339).

It must not be forgotten that a failure to equip a train with the

requisite number of air brakes is an act of negligence that may give a passenger, or even a traveler crossing the right of way, a right of action.

## CHAPTER XII.

### NEGLIGENT INJURY.

#### SECTION.

- 166. Use of car without automatic coupler is negligence *per se*.
- 167. Failure to equip car a continuing negligence.
- 168. Proximate cause of injury.
- 169. Assumption of risk.
- 170. Contributory negligence of plaintiff.
- 171. Two acts of negligence combining to produce injury.

#### SECTION.

- 172. State courts may enforce liability for negligence incurred under statute.
- 173. Removal of case to Federal court.
- 174. Judicial notice.
- 175. Pleading.
- 176. Validity of section concerning releases from liability.

§ 166. Use of car without automatic couplers is negligence *per se*.—The use of a car in interstate commerce without automatic couplers is negligence *per se*.<sup>1</sup>

§ 167. Failure to equip car a continuing negligence.—A failure to properly equip a car with automatic brakes used in interstate commerce is a continuing negligence, making the railway company liable for an injury to an employe while making a coupling in the discharge of his duty.<sup>2</sup>

<sup>1</sup>Winkler v. Philadelphia, etc., R. Co. 4 Penn. (Del.) 80; 53 Atl. Rep. 90; affirmed 4 Penn. (Del.) 387; 56 Atl. Rep. 112; Voelker v. Chicago, etc., Ry. Co. 116 Fed. Rep. 867. See also Southern Ry. Co. v. Carson, 194 U. S. 136.

<sup>2</sup>Fleming v. Southern Ry. Co. 131 N. C. 476; 42 S. E. Rep. 905; Elmore v. Seaboard, etc., Ry. Co. 132 N. C. 865; 44 S. E. Rep. 620; Greenlee v. Southern Ry. Co. 122 N. C. 977; 30 S. E. Rep. 115; 11

Am. & Eng. R. Cas. (N. S.) 45; 41 L. R. A. 399; 65 Am. St. Rep. 734 (no statute relied upon); Mason v. Railroad Co. 111 N. C. 482; 16 S. E. Rep. 698; Whitsell v. Railroad Co. 120 N. C. 557; 27 S. E. Rep. 125; Troxler v. Southern Ry. Co. 124 N. C. 191; 32 S. E. Rep. 550; 44 L. R. A. 312; 70 Am. St. Rep. 580.

The obligation to equip its cars cannot be evaded by assigning the duty to an employe of the com-



**§ 163. Proximate cause of injury.**—In order to enable an employee to recover where he has been injured by a car not properly equipped with automatic couplers, such improper equipment, or the absence of an automatic coupler, must have been the proximate cause of his injury; and he has the burden to show that such was the fact.<sup>3</sup> But the failure to equip a car as the statute requires, by reason of which an employee is obliged to go between cars where he is injured is the proximate cause of the accident, although the cars were forced together by the negligent kicking of the other cars against them.<sup>4</sup> The absence of a proper coupling must have been the cause of the injury before a recovery can be had for a failure to comply with the statute.<sup>5</sup> But

pany. Thus, the act of a conductor in charge of a train in deciding what shall be done with a defective car is the act of the company; and the negligence of the engineer cannot be resorted to in order to excuse the company from liability occasioned by a defective coupler and his negligence. *Chicago, etc., R. Co. v. King*, 167 Fed. Rep. — (decided February 3, 1909).

<sup>3</sup> *Voelker v. Chicago, etc., Ry. Co.* 116 Fed. Rep. 867 (injury caused while attempting to adjust a coupler); *Crawford v. New York, etc., R. Co.* 10 Amer. Neg. Cas. 166; *Donegan v. Baltimore, etc., R. Co.* 165 Fed. Rep. 869; *Chicago, etc., R. Co. v. King*, 167 Fed. Rep. — (decided February 3, 1909), injury occasioned while trying to put on a new knuckle.

<sup>4</sup> *Voelker v. Chicago, etc., Ry. Co. supra.*

<sup>5</sup> *Elmore v. Seaboard, etc., Ry. Co.* 132 N. C. 865; 44 S. E. Rep. 620; 131 N. C. 569; 42 S. E. Rep. 989. Nearly all the cases now hold that an action by the Government to recover a penalty under

this statute is a civil action. *United States v. Baltimore, etc., R. Co.* (Appendix G, p. 357); *United States v. Terminal, etc.* (Appendix G, p. 325); *United States v. Nevada County, etc., R. Co.* (Appendix G, p. 337); *United States v. Chicago, etc., R. Co.* (Appendix G, p. 362); *United States v. Denver, etc., R. Co.* 163 Fed. Rep. 519; *United States v. Chesapeake, etc., R. Co.* (Appendix G, p. 339); *United States v. Louisville, etc., R. Co.* 162 Fed. Rep. 185; *United States v. Chicago, etc., R. Co.* 162 Fed. Rep. 775; *United States v. Lehigh Valley R. Co.* 162 Fed. Rep. 410; *United States v. Philadelphia, etc., R. Co.* 162 Fed. Rep. 403; *United States v. Pennsylvania R. Co.* 162 Fed. Rep. 408; *United States v. Philadelphia, etc., R. Co.* 162 Fed. Rep. 405; *United States v. Atlantic Coast Line R. Co.* (Appendix G, p. 372); *Atlantic Coast Line R. Co. v. United States*, 167 Fed. Rep. — (decided March 1, 1909); *Wabash Ry. Co. v. United States*, 167 Fed. Rep. — (decided February 3, 1909); *United States v. Southern Ry. Co.* Appendix G, p. 367).

that the deceased employe was engaged in coupling cars at the time of his death, that the cars were not provided with automatic couplers, and that the intestate's death was caused by the old-fashioned coupler's slipping by one another, make out a *prima facie* case of negligence.\* It should be noted that there is nothing in the statute that limits the class of persons to whom the carrier shall be responsible for damages that result directly and immediately from a failure to comply with its provisions.\*\*

§ 169. **Assumption of risk.**—By undertaking to couple a car used in interstate commerce that has not been provided with such couplings as that statute requires, the employe does not assume the risk of making the coupling. If not equipped as the act of Congress requires, "the plaintiff did not assume the risk therefrom, even though he continued in the employment of the company after such unlawful use of the cars had come to his knowledge."† But the usual rules concerning the duties of a master to supply safe places for the servant apply; and the servant assumes the risks incident to his employment. By soliciting work he represents that he is competent to perform the work solicited.‡ Upon this

\* *Mobile, etc., R. Co. v. Bromberg*, 141 Ala. 258; 37 So. Rep. 395. A brakeman was directed to cut off the two rear cars while the train was moving slowly and before it reached a certain switch. The coupler being broken, he went between the cars and attempted to pull the pin by hand, but, not succeeding, started out when his foot was caught in an unblocked switch frog and he was injured. It was held that the question whether the failure of the defendant to have the car properly equipped was the proximate cause of the injury, so as to render it liable under the Safety Appliance Act was one of fact for the jury, and that it was error for the

court to direct a verdict for the defendant. *Donegan v. Baltimore, etc., R. Co.* 165 Fed. Rep. 869.

\*\* *Chicago, etc., R. Co. v. King*, 167 Fed. Rep. — (decided February 3, 1909).

† *Winkler v. Philadelphia, etc., Ry. Co.* 4 Penn. (Del.) 80; 53 Atl. Rep. 90; affirmed, 4 Penn. (Del.) 387; 56 Atl. Rep. 112; *Chicago, etc., Ry. Co. v. Voelker*, 129 Fed. Rep. 522; 65 C. C. A. 65; 70 L. R. A. 264; *Mobile, etc., R. Co. v. Bromberg*, 141 Ala. 258; 37 So. Rep. 395.

‡ *Winkler v. Philadelphia, etc., Ry. Co.* 4 Penn. (Del.) 80; 53 Atl. Rep. 90; *Malott v. Hood*, 201 Ill. 202; 66 N. E. Rep. 247; 99 Ill. App. 360.

question the Supreme Court has made the following observations: "It is enacted by Section 8 of the act that any employe, injured by any car in use contrary to the provisions of the act, shall not be deemed to have assumed the risk thereby occasioned, although continuing in the employment of the carrier after the unlawful use had been brought to his knowledge. An early, if not the earliest, application of the phrase 'assumption of risk' was the establishment of the exception to the liability of a master for the negligence of his servant when the person injured was a fellow servant of the negligent man. Whether an actual assumption by contract was supposed on grounds of economic theory, or the assumption was imputed because of a conception of justice and convenience, does not matter for the present purpose. Both reasons are suggested in the well known case of *Farwell v. Boston & Worcester R. R. Co.*<sup>9</sup> But, at the present time, the notion is not confined to risks of such negligence. It is extended, as in this statute it plainly is extended, to dangerous conditions, as of machinery, premises, and the like, which the injured party understood and appreciated when he submitted his person to them. In this class of cases the risk is said to be assumed because a person who freely and voluntarily encounters it has only himself to thank if harm comes, on a general principle of our law. Probably the modification of this general principle by some judicial decisions and by statutes like Section 8 is due to an opinion that men who work with their hands have not always the freedom and equality of position assumed by the doctrine of *laissez faire* to exist. Assumption of risk in this broad sense obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended or foreseen. He is held to as-

<sup>9</sup> 4 Met. 49.

sume the risk upon the same ground.<sup>10</sup> Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligence. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master, a matter upon which we express no opinion, then, unless great care be taken, the servant's right will be sacrificed by simply charging him with assumption of risk under another name. Especially is this true in Pennsylvania, where some cases, at least, seem to have treated assumption of risk and negligence as controvertible terms.<sup>11</sup> We cannot help thinking that this has happened in the present case, as well as that the ruling upon Schlemmer's negligence was so involved with and dependent upon erroneous views of the statute that if the judgment stood the statute would suffer a wound. To recur for a moment to the facts, the only ground, if any, on which Schlemmer could be charged with negligence is that when he was between the tracks he was twice warned by the yard conductor to keep his head down. It is true that he had a stick, which the rules of the company required to be used in coupling, but it could not have been used in this case, or at least the contrary could not be and was not assumed for the purpose of directing a nonsuit. It was necessary for him to get between the rails and under the shovel car as he did, and his orders contemplated that he should do so. But the opinion of the trial judge, to which, as has been seen, the Supreme

<sup>10</sup> Choctaw, Oklahoma & Gulf R. Co. v. McDade, 191 U. S. 64, 68; 24 Sup. Ct. Rep. 102; 48 L.

Ed. 207; affirming 52 C. C. A. 260; 114 Fed. Rep. 458.

<sup>11</sup> Patterson v. Pittsburg & Connellsville R. R. Co. 76 Pa. St. 389.

Court refers, did not put the decision on the fact of warning alone. On the contrary, it began with a statement that an employe takes the risk even of unusual dangers, if he has notice of them and voluntarily exposes himself to them. Then it went on to say that the deceased attempted to make the coupling with the full knowledge of the danger, and to imply that the defendant was guilty of no negligence in using the arrangement which it used. It then decided in terms that the shovel car was not a car within the meaning of Section 2. Only after these preliminaries did it say that, were the law otherwise, the deceased was guilty of contributory negligence; leaving it somewhat uncertain what the negligence was. It seems to us not extravagant to say that the final ruling was so implicated with the earlier errors that on that ground alone the judgment should not be allowed to stand. We are clearly of opinion that Schlemmer's rights were in no way impaired by his getting between the rails and attempting to couple the cars. So far he was saved by the provision that he did not assume the risk. The negligence, if any, came later. We doubt if this was the opinion of the court below. But suppose the nonsuit has been put clearly and in terms on Schlemmer's raising his head too high after he had been warned. Still we could not avoid dealing with the case, because it still would be our duty to see that his privilege against being held to have assumed the risk of the situation should not be impaired by holding the same thing under another name. If a man not intent on suicide, but desiring to live, is said to be chargeable with negligence as matter of law when he miscalculates the height of the car behind him by an inch, while his duty requires him, in his crouching position, to direct a heavy draw bar moving above him into a small slot in front, and this in the dusk, at nearly nine of an August evening, it is utterly impossible for us to interpret this ruling as not, however unconsciously, introducing the notion that to some extent the man had taken the risk of the danger by being in the place at all. But whatever may have been the meaning of

the local courts, we are of opinion that the possibility of such a minute miscalculation, under such circumstances, whatever it may be called, was so inevitably and clearly attached to the risk which Schlemmer did not assume, that to enforce the statute requires that the judgment should be reversed."<sup>12</sup> The provisions of this statute cannot, however, be applied to an instance of "kicking" cars onto a switch.<sup>13</sup> A switchman engaged in handling a freight car having a defective coupler, on a track which is principally used for handling freight trains, although occasionally cars are brought upon the track for repairs, does not assume the risk arising from the defect in such coupler, when he is not engaged in moving the car as one in bad order with a view to its isolation or repair.<sup>14</sup>

§ 170. **Contributory negligence of plaintiff.**—While an employe of a railroad does not assume the risk in coupling a car not equipped with automatic couplers, yet if he is guilty of negligence contributing to his injuries he cannot recover.

<sup>12</sup> *Schlemmer v. Buffalo, etc., R. Co.* 205 U. S. 1; 28 Sup. Ct. Rep. 616; 51 L. Ed. 681; reversing 207 Pa. St. 198; 56 Atl. Rep. 417.

<sup>13</sup> *Chicago, etc., Ry. Co. v. Voelker*, 129 Fed. Rep. 522; 65 C. C. A. 65; 70 L. R. A. 264, reversing 116 Fed. Rep. 867. This is the only point upon which this case was reversed; on all other points the first decision is an authority.

<sup>14</sup> *Chicago, etc., R. Co. v. Voelker*, *supra*. "It cannot be assumed that by the passage of a salutary law designed for the protection of those engaged in hazardous occupations Congress intended to offer a premium for carelessness or to grant immunity from the consequences of negligence. The reasonable conclusion is that the defense of contributory negligence is as available to a rail-

road company after as before the passage of the act of Congress, although it has not complied with its requirements." *Denver, etc., R. Co. v. Arrighi*, 129 Fed. Rep. 347. The Government is entitled to recover the statutory penalty under all circumstances where an injured employe has, under the statute, the benefit of denial of assumption of risk. *United States v. Atlantic, etc., R. Co.* 153 Fed. Rep. 918.

The Safety Appliance Act would be honored only in their breach if the same facts that would defeat the employee under the common law rule of assumed risk can be used to defeat him under the name of contributory negligence. *Chicago, etc., R. Co. v. King*, 167 Fed. Rep. — (decided February 3, 1909).

If, in "using such unlawful coupler, the plaintiff contributed to the accident by his own carelessness, he cannot recover, notwithstanding the fact that the coupling was unlawful. In such a case he must take the consequence of his own contributory negligence." "It is the duty of the servant, as well as of the master, to exercise care and prudence in all cases commensurate with the risk or danger of the employment. Therefore, if the plaintiff contributed to the accident by his own negligence he cannot recover."<sup>15</sup> It is not contributory negligence, however, in the employe to attempt to couple or uncouple a car not equipped as the act of Congress requires; and he may recover if he does if his injuries "resulted from such unlawful use alone."<sup>16</sup> For an employe to remain in the railway company's service, knowing that the cars had not been equipped with automatic couplers, is not contributory negligence.<sup>17</sup> The employe must use ordinary care to avoid an injury.<sup>18</sup> If the servant could have coupled the cars more safely from the one side of the car than another, he must do so, if he could have done the work as well by going in on the safe side.<sup>19</sup> If the rules of the company require him to use a stick in coupling, he must do so if practicable; but if not practicable, he need not do so, as where the coupler weighed 120 pounds and was six feet long.<sup>20</sup>

<sup>15</sup> *Winkler v. Philadelphia, etc., R. Co.* 4 Penn. (Del.) 80; 53 Atl. Rep. 90, affirmed; 4 Penn. (Del.) 387; 56 Atl. Rep. 112; *Mobile, etc., R. Co. v. Bromberg*, 141 Ala. 258; 37 So. Rep. 395; *Voelker v. Chicago, etc., Ry. Co.* 116 Fed. Rep. 867; *Denver, etc., R. Co. v. Arrighi*, 129 Fed. Rep. 347.

<sup>16</sup> *Winkler v. Philadelphia, etc., R. Co. supra.*

<sup>17</sup> *Elmore v. Seaboard, etc., Ry. Co.* 132 N. C. 865; 44 S. E. Rep. 620; 131 N. C. 569; 42 S. E. Rep. 989.

<sup>18</sup> *Cleveland, etc., Ry. Co. v. Curtis*, 134 Ill. App. 565.

<sup>19</sup> *Mobile, etc., R. Co. v. Bromberg*, 141 Ala. 258; 37 So. Rep. 395.

<sup>20</sup> *Fleming v. Southern Ry. Co.* 131 N. C. 476; 42 S. E. Rep. 905.

In this case it was also held that the employe could recover, although he was guilty of contributory negligence.

The plaintiff's knowledge of the physical conditions cannot be charged against him in determining the quality of his conduct in going and being between the cars when he was injured. *Chicago, etc., R. Co. v. King*, 167 Fed. Rep. — (decided February 3, 1909).

§ 171. **Two acts of negligence combining to produce injury.**—Two acts of negligence may so combine as to produce an injury, one of which is a violation of the Safety Appliance Act with reference to automatic couplers. In such an instance the company will be liable, although but for the combination the injury would not have been inflicted.<sup>21</sup> And a violation of the Safety Appliance Act may always be considered by the jury in determining whether or not the defendant company was negligent, so far as its duty was concerned towards the employe who was injured while coupling cars not equipped with automatic brakes as the statute required.<sup>22</sup>

§ 172. **State courts may enforce liability for negligence incurred under statute.**—The state courts have the power to entertain suits to recover damages received by reason of a violation of the Safety Appliance Statute.<sup>23</sup> A number of cases have reached the highest courts of several states which had been brought upon the federal statute.<sup>24</sup> And it has been expressly decided that this federal statute is binding upon a state court and must be applied when the pleadings and facts proven show the case falls within its provisions.<sup>25</sup>

<sup>21</sup> Voelker v. Chicago, etc., Ry. Co. 116 Fed. Rep. 867.

<sup>22</sup> Crawford v. New York, etc., R. Co. 10 Am. & Eng. Neg. Cas. 166; see Chicago, etc., R. Co. v. King, 167 Fed. Rep. — (decided February 3, 1900).

<sup>23</sup> St. Louis, etc., Ry. Co. v. Taylor, 210 U. S. 281; 28 Sup. Ct. Rep. 616; Schlemmer v. Buffalo, etc., Ry. Co. 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 681; reversing 207 Pa. St. 198; 56 Atl. Rep. 417; Southern Pac. R. Co. v. Allen (Tex. Civ. App.); 106 S. W. Rep. 441; Mobile, etc., R. Co. v. Bromberg, 141 Ala. 258; 37 So. Rep. 395; Crawford v. New York,

etc., R. Co. 10 Am. & Eng. Neg. Cas. 166.

<sup>24</sup> Missouri Pac. Ry. Co. v. Brinklemeier (Kan.); 193 Pac. Rep. 621; Southern Pac. R. Co. v. Allen (Tex. Civ. App.); 106 S. W. Rep. 441; Chicago, etc., Ry. Co. v. State (Ark.); 111 S. W. Rep. 456; Cleveland, etc., Ry. Co. v. Curtis, 134 Ill. App. 565; Nichols v. Chesapeake, etc., Ry. Co. (Ky.); 105 S. W. Rep. 481; 32 Ky. L. Rep. 270. See Harden v. North Carolina R. Co. 129 N. C. 354; 40 S. E. Rep. 184; 55 L. R. A. 784.

<sup>25</sup> Mobile, etc., R. Co. v. Bromberg, 141 Ala. 258; 37 So. Rep.



§ 173. **Removal of case to federal court.**—As the injured employe, when he bases his cause of action upon the terms of the federal statute, can bring his suit in the federal court, the defendant can insist, when the suit is brought on the statute in a state court, if the amount demanded is two thousand dollars or more, that it be removed into the proper federal court. One case on this question was determined in one of the circuit courts. The court assumed the statute was valid, and then proceeded to discuss its removability into the federal court: “Does it follow that the case is a removable one? It is the contention of the plaintiff that the cause of action does not arise under this act of Congress, or at least that it does not so appear from the allegations of this petition. It is undoubtedly true that under the Act March 3, 1887, c. 373,<sup>26</sup> and Act August 13, 1888, c. 866,<sup>27</sup> a case not depending on diversity of citizenship cannot be removed from a state court into the Circuit Court of the United States, as one arising under the Constitution or law of the United States, unless that fact appears by the plaintiff’s own statement of his cause of action; and if it does not, the fact cannot be supplied by the petition for removal.<sup>28</sup> But the court takes notice of the laws of Congress, and, if the facts stated by the plaintiff as the basis of his right of recovery show a right of action given or created by such law, then it may fairly be said that it appears from his own statement of his claim that the action is one arising under a law of the United States. If the same facts show, also, a right of action created or given by a state law, still it would be for the court to determine under which statute the action was maintainable, if at all;

395; *Kansas City, etc., R. Co. v. Flippo*, 138 Ala. 487; 35 So. Rep. 457. See *Georgia Pac. R. Co. v. Davis*, 92 Ala. 307; 9 So. Rep. 253; 25 Am. St. Rep. 47.

<sup>26</sup> 24 Stat. at L. 552.

<sup>27</sup> 25 Stat. at L. 433 (U. S. Comp. St. 1901, p. 509).

<sup>28</sup> Citing *Chappel v. Waterworth*, 155 U. S. 102; 15 Sup. Ct. Rep. 34; 39 L. Ed. 85; reversing 39 Fed. Rep. 77; *Third St. R. Co. v. Lewis*, 173 U. S. 457; 19 Sup. Ct. Rep. 451; 43 L. Ed. 766.

and if one construction of the federal statute would sustain, and another construction would defeat, a recovery under that statute, the action would be one arising under a law of the United States, and therefore of federal cognizance.<sup>29</sup> It sufficiently appears, therefore, from plaintiff's petition that the cause of action as alleged therein is one arising under a law of the United States," the Act of June 11, 1906.<sup>30</sup>

§ 174. **Judicial notice.**—A state court will take, and is bound to, notice of the Safety Appliance Act.<sup>31</sup>

§ 175. **Pleading.**—It is not necessary in bringing an action under the federal statute to specifically refer to it; in fact, it is not good pleading to do so. "As a matter of pleading, it certainly cannot be said that, in order to base a right of recovery on the provisions of the statute, it was necessary to cite the statute or its provisions in the petition. The petition in set words charged the defendant with negligence in having and operating a car upon which was a defective, worn out and inoperative coupler which would not couple by impact. Charging the defendant with negligence was charging that the company had not met or fulfilled the duty imposed upon it by law with respect to having and keeping the coupler upon the car in proper condition for use. It was not necessary, nor, indeed, permissible, under the rules of pleading, that the petition should set forth the law which had been violated."<sup>32</sup> \* \* \*

<sup>29</sup> Citing *Starin v. New York*, 115 U. S. 248; 6 Sup. Ct. Rep. 28; 29 L. Ed. 388; affirming 21 Fed. Rep. 593; *Carson v. Dunham*, 121 U. S. 421; 7 Sup. Ct. Rep. 1030; 30 L. Ed. 992.

<sup>30</sup> *Hall v. Chicago, etc., R. Co.* 149 Fed. Rep. 564.

<sup>31</sup> *Mobile, etc., R. Co. v. Bromberg*, 141 Ala. 258; 37 So. Rep. 395; *Kansas City, etc., R. Co. v. Flippo*, 138 Ala. 487; 35 So. Rep. 457.

<sup>32</sup> "It is not for one moment supposable that the officers of the defendant company or the learned counsel representing it in this case are not, and were not, when this action was commenced, fully aware of the provisions of the act of Congress of March 2, 1893, and the acts of the General Assembly of the State of Iowa, which now form Sections 2079 and 2083, both inclusive, of the code of the state, and therefore knew that as cars

Therefore, when the petition charged the defendant with negligence with respect to the coupler upon the car the defendant must have known, as the car was used in interstate traffic, the act of Congress would necessarily come into consideration in defining the obligations resting upon the defendant company."<sup>33</sup>

**§ 176. Validity of section concerning releases from liability.**—Statutes similar to section five concerning a servant agreeing to exempt his master from liability for his injuries have been held valid in a number of states. A statute prohibiting such a contract is constitutional and within the power of a legislature to adopt on the ground of public policy.<sup>34</sup>

used in interstate traffic the obligations of the act of Congress were in force and as to cars used within the State of Iowa the named sections of the code were applicable." From the opinion above quoted from.

<sup>33</sup> Voelker v. Chicago, etc., Ry. Co. 116 Fed. Rep. 867. Approved, Missouri Pac. Ry. Co. v. Brinkmeier (Kan.); 93 Pac. Rep. 621; 50 Am. & Eng. R. Cas. (N. S.) 441; Kansas City, etc., R. Co. v. Flippo, 138 Ala. 487; 35 So. Rep. 457.

In a case in the United States Court for the District of North Carolina, the court held an action to recover a penalty a civil action, and that it was not necessary to allege the specific date of the violation of the statute. United States v. Atlantic, etc., Ry. Co. 153 Fed. Rep. 918.

In Alabama, very general terms, little short of conclusions, may be used in pleading. Kansas City, etc.,

R. Co. v. Flippo, 138 Ala. 487; 35 So. Rep. 457; adopting Georgia Pac. R. Co. v. Davis, 92 Ala. 307; 9 So. Rep. 253; 25 Am. St. Rep. 47. In this state the complaint need not contain an allegation stating in what manner the failure to comply with the statute caused the injury. Mobile, etc., R. Co. v. Bromberg, 141 Ala. 258; 37 So. Rep. 395.

<sup>34</sup> Pittsburg, etc., R. Co. v. Montgomery, 152 Ind. 1; 45 N. E. Rep. 582; Pittsburg, etc., R. Co. v. Hosea, 152 Ind. 412; 53 N. E. Rep. 419; Kilpatrick v. Railroad Co. 74 Vt. 288; 52 Atl. Rep. 531; 93 Am. St. Rep. 887.

A statute forbidding a contract that the employe shall not recover damages if he accepts relief from a relief association has been sustained. McGuire v. Chicago, etc., R. Co. (Iowa); 108 N. W. Rep. 902; *contra*, Shaver v. Pennsylvania Co. 71 Fed. Rep. 331.

## CHAPTER XIII.

### ACTION TO RECOVER PENALTY.

**SECTION.**

**SECTION.**

177. "Suits" — Criminal offense  
—Presumption of innocence — Burden—Reasonable doubt.

178. Action to recover a penalty not a criminal action.

179. Joint action.

180. Government's petition.

181. Sufficiency of proof—Burden.

182. Amount of penalty.

183. Writ of error.

§ 177. "Suits"—Criminal offense—Presumption of innocence—Burden—Reasonable doubt.—An action or suit brought by the government to recover a penalty because of non-compliance with the statute in providing cars with automatic couplers has been held to be a criminal action and not a civil action, and must be tried as a criminal case, violations of the statute being construed as criminal offenses—crimes and misdemeanors in the broad sense of the words. The presumption, it was held, therefore, that the defendant is innocent, and that it cannot be found guilty until the evidence removes all reasonable doubt of its guilt, the burden resting upon the government to show beyond a reasonable doubt the existence of every element necessary to constitute the offense; and this burden continues throughout the case and never shifts to the defendant.<sup>1</sup>

§ 178. Action to recover penalty not a criminal action.—In the United States Court for the District of North Carolina, Judge Purnell held, in 1907, that in an action by the government to recover a penalty for a violation of the Safety Appliance Act, the action was governed by the state statute and was a civil suit, and that it was not necessary to allege the specific date on which the statute had been violated by

<sup>1</sup> United States v. Illinois Cent. R. Co. 156 Fed. Rep. 180.

the defendant. "This is an action in debt,"<sup>2</sup> said the court, and he follows the State Supreme Court's construction of such a suit.<sup>3</sup> "The number of the car and nature of the traffic and the date given in each count sufficiently advise the defendant of the times of the violation," said the court, so that it can intelligently prepare its defense. This is sufficient."<sup>4</sup> In another court it was held that it was only incumbent upon the government to prove its case by a preponderance of the evidence, and it need not show the facts constituting the violation beyond a reasonable doubt;<sup>5</sup> and this is now the accepted rule, the case being considered merely a civil action to recover a penalty.<sup>5\*</sup>

**§ 179. Joint action.**—A joint action may be maintained against two or more companies hauling the same car in a continuous passage over their several roads.<sup>6</sup>

**§ 180. Government's petition.**—In a complaint to recover a penalty under this statute, it is not defective for a failure to negative the exception in the proviso to Section 7 of the act,<sup>7</sup> nor is it defective because it shows that only one of the couplers was out of repair and defective, being so because the uncoupling chain was "kinked"; or because it fails to negative the exercise of reasonable care on the part

<sup>2</sup> Citing *United States v. Southern Ry. Co.* 135 Fed. Rep. 122.

<sup>3</sup> Citing *Hilton Lumber Co. v. Atlantic Coast Line Railroad*, 141 N. C. 171; 53 N. E. Rep. 823; 6 L. R. A. (N. S.) 225.

<sup>4</sup> *United States v. Atlantic, etc., R. Co.* 153 Fed. Rep. 918.

<sup>5</sup> *United States v. Central of Ga. Ry. Co.* 157 Fed. Rep. 893.

<sup>5\*</sup> *Atlantic Coast Line R. Co. v. United States*, 167 Fed. Rep. — (decided March 1, 1909); *United States v. Atlantic Coast Line R. Co.* Appendix G, p. 372; *United States v. P. & Ry. Co.* 162 Fed. Rep. 403; *United States v. Chicago, etc., R.*

*Co.* 162 Fed. Rep. 775; *United States v. Baltimore, etc., R. Co.* 159 Fed. Rep. 33; *Wabash R. Co. v. United States*, 167 Fed. Rep. (decided February 3, 1909); *United States v. Southern Ry. Co.* (Appendix G, p. 343); *United States v. Illinois Central R. Co.* (Appendix G, p. 376).

<sup>6</sup> *United States v. Chicago, etc., R. Co.* 143 Fed. Rep. 353; *Chaffee v. United States*, 18 Wall. 518, 538.

<sup>7</sup> *Schlemmer v. Buffalo, etc., R. Co.* 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 681; reversing 207 Pa. St. 198; 56 Atl. Rep. 417.

of the defendant in maintaining the coupler in an operative condition; nor, although showing an actual and substantial hauling of the car in interstate traffic, because it fails to specify how far the hauling was continued, or is even silent as to the actual use of the defective coupler.<sup>8</sup> The practice in the state courts of the district in civil cases control and must be followed.<sup>9\*</sup>

**§. 181. Sufficiency of proof—Burden.**—It is not necessary that the government prove its case beyond a reasonable doubt; but it has the burden to prove its case by evidence that is clear and satisfactory to the jury, and that burden never shifts. It must make out all the elements which go to constitute the charge in the petition. If it fails to come up to this standard, it fails to make out a case.<sup>9</sup> The government need not show that the defendant had not used due care or ordinary diligence in making an inspection and in repairing the defects an inspection would have shown.<sup>10</sup> The rule that positive testimony is preferred to negative testimony, in the absence of other testimony or corroborative evidence, has been adopted.<sup>11</sup> The government must show that the defendant was, at the time the alleged

\* *United States v. Denver, etc.*, R. Co. 163 Fed. Rep. 519.

\*\* *Atlantic Coast Line R. Co. v. United States*, 167 Fed. Rep. — (decided March 1, 1909); *United States v. Atlantic Coast Line R. Co.* Appendix G; *Chicago, etc., R. Co. v. United States*, 167 Fed. Rep. — (decided March 10, 1909).

In the first case cited it was held that in alleging the time of the violation of the statute the declaration was not bad because it was laid "on or about" a certain day named.

\* *United States v. Philadelphia, etc., R. Co.* (Appendix G, p. 315); *United States v. Pennsylvania R. Co.* (Appendix G, p. 321; *United*

*States v. Lehigh Valley R. Co.* (Appendix G, p. 311); *United States v. Chicago, etc., R. Co.* 162 Fed. Rep. 775; *United States v. Louisville, etc., R. Co.* 162 Fed. Rep. 185; *United States v. Chesapeake & Ohio Ry.* (Appendix G, p. 329, 333); *United States v. Chicago, etc., Ry. Co.* (Appendix G, pp. 299, 329); *United States v. Chicago, etc., R. Co.* (Appendix G, p. 362); *United States v. Nevada, etc., R. Co.* (Appendix G, p. 337); *United States v. Boston & Maine R. Co.* (Appendix G, p. 350).

<sup>10</sup> *United States v. Atlantic, etc., R. Co.* 153 Fed. Rep. 918; *United States v. Wabash R. Co.* (Appendix G, p. 282).

<sup>11</sup> *United States v. Atchison, etc., R. Co.* (Appendix G).

offense was committed, a common carrier by railroad engaged in interstate commerce; that it either hauled or permitted to be hauled over its line, the locomotives, trains or cars mentioned in its complaint; and that these locomotives, trains or cars were not provided with the equipment required by the statute.<sup>12</sup> When it has made this proof, then the burden is upon the defendant to show an excuse,—to show that it had used all reasonably possible endeavor to perform its duty to discover and correct the defect.<sup>12\*</sup>

**§ 182. Amount of penalty.**—A railroad company hauling cars not equipped as the statute requires is liable to a penalty of \$100 for each car so hauled.<sup>13</sup> But for hauling a train of cars not properly equipped with air brakes there can be recovered a penalty of only \$100 for the entire train regardless of the number of cars not equipped with air brakes.<sup>14</sup>

**§ 183. Writ of Error.**—From an adverse judgment the Government may have a writ of error from the District Court to the Circuit Court of Appeals.<sup>15</sup>

<sup>12</sup> *United States v. Pacific Coast Ry. Co.* (Appendix G, p. 285).

<sup>12\*</sup> *United States v. Illinois Central R. Co.* (Appendix G, p. 376.) An expert trainman may be asked at the trial concerning the condition of the car coupler and as to what was necessary in order to operate such coupler. The mode of operating automatic coupling mechanism and the effect of various conditions thereof is the subject of expert testimony. *Wabash R. Co. v. United States*, 167 Fed. Rep. — (decided February 3, 1909). See *Chicago, etc., R. Co. v. King*, 167 Fed. Rep. — (decided February 3, 1909).

<sup>13</sup> *United States v. Chicago, etc., R. Co.* 162 Fed. Rep. 775; *United States v. Atlantic Coast Line R. Co.* (Appendix G, p. 372); *Atlantic Coast Line R. Co. v. United States*, 167 Fed. Rep. — (decided March 1, 1909).

<sup>14</sup> *United States v. Chicago etc., R. Co.* 162 Fed. Rep. 775.

<sup>15</sup> *United States v. Illinois Central R. Co.* (Appendix G, p. 376.) Of course, the defendant may also have the writ when the judgment is adverse to it. *Atlantic Coast Line R. Co.* 167 Fed. Rep. — (decided March 1, 1909).

## **APPENDIX.**





## APPENDIX A.

### EMPLOYERS' LIABILITY ACTS.

[Act of 1906.]

AN ACT relating to liability of common carriers in the District of Columbia and Territories, and common carriers engaged in commerce between the States and between the States and foreign nations to their employes.

[Act of 1906.]

*Be it enacted by the Senate and House of Representatives of the United States in Congress assembled,* That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employes, or in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employes, or by reason of any defect or insufficiency due to its

[Act of 1908.]

AN ACT relating to the liability of common carriers by railroad to their employes in certain cases.

[Act of 1908.]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia, or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury

if such person is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative for the benefit of the surviving widow or husband and children of such employe; and if none, then of such employe's parents, and if none, then to the next of kin dependent upon such employe for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to its negli-

negligence in its cars, engines, appliances, machinery, track, road-bed, ways or works.

gence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment.

SEC. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or in case of the death of such employe, to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employe; and if none, then of such employe's parents; and if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves or other equipment.

SEC. 2. That in all actions hereafter brought against any common carrier to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. All questions of negligence and contributory negligence shall be for the jury.

SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of the provisions of this act to recover damages for personal injury to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe: *Provided, however,* That no such employe who may be injured or killed shall be held to have been guilty of contributory negli-

gence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

SEC. 3. That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employe, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employe: *Provided, however,* That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employe, or in case of his death, to his personal representative.

SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, or relief benefit, or indemnity that may have been paid to the injured employe, or the person entitled thereto, on account of the injury or death for which said action was brought.

SEC. 4. That no action shall be maintained under this act, unless commenced within one year from the time the cause of action accrued.

SEC. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

*Action accrued when employee was injured by death.*  
*55 St. J. L. En. 3, 351.*  
*Assignment to Phil. Sq. Co.*  
*1924*

SEC. 5. That nothing in this act shall be held to limit the duty of common carriers by railroads, or impair the rights of their employes under the Safety Appliance Act of March 2, 1893, as amended April 1, 1896, and March 2, 1903.

Approved June 11, 1906; 34 Stat. at Large, 232 c. 3073.

SEC. 7. That the term "common carrier" as used in this act shall include the receiver or receivers, or other persons or corporations charged with the duty of the management of the business of a common carrier.

SEC. 8. That nothing in this act shall be held to limit the duty or liability of common carriers or impair the rights of their employes under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress, entitled, "An act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employes," approved June 11, 1906.

Approved April 22, 1908.

*Sec. 9 added Sec  
36 M. S. L. E. 1, 1911*

## APPENDIX B.

### REPORT OF HOUSE JUDICIAL COMMITTEE ON FEDERAL EMPLOYES' LIABILITY ACT.

The Committee on the Judiciary, to whom was referred House Bill 20310, have had the same under consideration, and report it to the House with a recommendation that it pass.

This bill relates to common carriers by railroad engaged in interstate and foreign commerce and in commerce in the District of Columbia, the Territories, the Canal Zone, and other possessions of the United States. It is intended in its scope to cover all commerce to which the regulative power of Congress extends.

The purpose of this bill is to change the common-law liability of employers of labor in this line of commerce, for personal injuries received by employees in the service. It abolishes the strict common-law rule of liability which bars a recovery for the personal injury or death of an employee, occasioned by the negligence of a fellow-servant. It also relaxes the common-law rule which makes contributory negligence a defense to claims for such injuries. It permits a recovery by an employee for an injury caused by the negligence of a co-employee; nor is such a recovery barred even though the injured one contributed by his own negligence to the injury. The amount of the recovery, however, is diminished in the same degree that the negligence of the injured one contributed to the injury. It makes each party responsible for his own negligence, and requires each to bear the burden thereof. The bill also provides that, to the extent that any contract, rule, or regulation seeks to exempt the em-

ployer from liability created by this act, to that extent such contract, rule or regulation shall be void.

Many of the States have already changed the common-law rule in these particulars, and by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees.

Sections 1 and 2 of this bill provide that common carriers by railroad, engaged in interstate and foreign commerce, in commerce in the District of Columbia, the Territories, the Panama Canal Zone, and other possessions of the United States, shall be liable to its employees for personal injuries resulting from its negligence or by reason of any defect or insufficiency due to its negligence in its roads, equipment, or methods. It is not a new departure, but rather goes back to the old law which made the master liable for injury occasioned by the negligence of his servant, either to a co-servant or to a third person.

The doctrine of fellow-servant was first enunciated in England in 1837, and since that time it has been generally followed in that country and this, except where abrogated or modified by statute. Whatever reason may have existed for the doctrine at the time it was first announced, it can not be said to exist now, under modern methods of commerce by railroad. It is possible that a century ago, under industrial methods and systems as they then existed, co-employees could have some influence over each other tending to their personal safety. It is possible that they could know something of the habits and characteristics of each other. Under present industrial methods and systems this can not be true. Then they worked with simple tools and were closely associated with each other in their work. Now they work with powerful and complex machinery, with widely diversified duties, and are distributed over larger areas and often widely separated from each other. Under present methods, personal injuries have become a prodigious burden to the employees engaged in our industrial and commercial systems.

The master should be made wholly responsible for injury

to the servant by reason of the negligence of a co-servant. He exercises the authority of choosing the employees and if made responsible for their acts while in line of duty he will be induced to exercise the highest degree of care in selecting competent and careful persons and will feel bound at all times to exercise over employees an authority and influence which will compel the highest degree of care on their part for the safety of each other in the performance of their duties.

These sections make the employer liable for injury caused by defects or insufficiencies in the roadbed, tracks, engines, machinery, and other appliances used in the operation of railroads. Over these things the employee has absolutely no authority. The employer has complete authority over them, both in their construction and in their maintenance. It is a very hard rule, indeed, to compel men, who by the exigencies and necessities of life are bound to labor, to assume the risks and hazards of the employment, when these risks and hazards could be greatly lessened by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work. We believe that a strict rule of liability of the employer to the employee for injuries received for defective machinery will greatly lessen personal injuries on that account. The common-law rules of fellow-servants and assumption of risk still prevail in many of the States, and without any apparent good reason. In recent years many of the countries of Europe have adopted new rules of liability, which greatly relieve the harshness of the common law as it still exists in some of the States.

In 1888 England passed an act which abolished the doctrine of fellow-servant with reference to the operation of railroad trains, and in 1897 it extended this law to apply to many of the hazardous employments of the country.

For many years the doctrine in Germany has been yielding step by step to better rules, until for the last quarter of a



century it does not apply to any of the hazardous occupations.

In 1869 Austria passed a law making railroad companies liable for all injuries to their employees except where the injury was due to the victim's own negligence.

The Code Napoleon made the employer answerable for all injuries received by his workmen, and this code is still in force in Belgium and Holland.

Other European countries have from time to time made laws fixing the liability of the master for damages caused by the negligent act of his servant.

Many of the States have passed laws modifying the doctrine as changing conditions required it and justice to the employee demanded it.

Alabama in 1885 eliminated the doctrine so far as it relates to railroads, and in other particulars.

Arkansas in 1893 qualified the doctrine as to railroad employment.

Georgia in 1856 entirely abolished the doctrine as to railroads.

Iowa abolished it as to train operatives in 1862.

Kansas did the same thing in 1874.

The latest statute in Wisconsin on the subject abolished the fellow-servant doctrine as to employees actually engaged in operating trains.

Minnesota did the same thing in 1887.

Florida, Ohio, Mississippi, and Texas have changed the doctrine to the advantage of the employee.

North Carolina, North Dakota, and Massachusetts have practically eliminated the doctrine as regards the operation of railroad trains.

Colorado in 1901 abolished the doctrine in toto.

Other States have either abolished it or modified it as regards the operation of railroads.

As compared with the law now in force in other countries and in many of the States, the changes made in the law of fellow-servant by this bill are not radical. The doctrine as

regards the hazardous occupations is being relegated everywhere.

A Federal Statute of this character will supplant the numerous State Statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all the States.

It is thought that the adoption of the rule, as provided in this section, will be conducive to greater care in the operation of railroads. As it is now, where the doctrine of fellow-servant is in force, no one is responsible for the injury or death of an employee if caused by the carelessness of a co-employee. The co-servant who is guilty of negligence resulting in the injury may be liable, but as a rule he is not responsible, and hence the injury is not compensated. The employee is not held by the employer to such strict rules of caution for the safety of his co-employee, because the employer is not bound to pay the damages in case of injury. If he were held liable for damages for every injury occasioned by the negligence of his servant, he would impose the same strict rules for the safety of his employees as he does for the safety of passengers and strangers. He will make the employment of his servant and his retention in the service dependent upon the exercise of higher care, and this will be the stronger inducement to the employee to act with a higher regard for the safety of his fellow-workmen.

Section 3 is a modification of the common-law rule of contributory negligence. It does not abolish the law. Under its provisions contributory negligence still bars a recovery for personal injury so far as the injury is due to the contributory negligence of the employee, but entitles the employee to recover for the injury so far as it is due to the negligence of the employer. It differs from the Act passed by Congress in June, 1906, on this point, in this: That law provided that contributory negligence did not bar a recovery if the negligence of the employee was slight and that of the employer

was gross in comparison. That law modified the common-law rule of contributory negligence and also contained a modification of the common-law doctrine of comparative negligence. We are unable to see any justification whatever in the common-law doctrine of comparative negligence anywhere. It is the only rule of negligence that permits an employee to recover damages for injury to which his own negligence contributed. Comparative negligence is absolutely wrong in principle, for the reason that it permits the employee to recover full damages for injury, even though his own negligence contributed to it. It is true, as the law states it, he can only recover damages when his contributory negligence is slight and that of the employer is gross in comparison. But that rule does not undertake to diminish the verdict in proportion to the negligence of the employee. This may be said in behalf of the doctrine of contributory negligence in its common-law purity, and it is the only reason, so far as we know, that has ever been assigned for its existence: It tends to make the employee exercise a higher degree of care for his own safety.

If that is a good reason for the existence of that rule, then we believe that Section 3 of this bill is a very great improvement on that doctrine, for the reason that it imposes the burden of the employer's negligence on the employer, and he will thus be induced to exercise higher care in the selection of his employees, and in other ways, for the safety of persons in his employment. If the law imposes on the employee the burden of his own negligence, that is certainly sufficient, and that is what this section seeks to do, and it also seeks to impose upon the employer the burden of his negligence. It provides that contributory negligence shall not bar a recovery for injury due to the negligence of the employer. It provides that the jury shall diminish the damages suffered by the injured employee in proportion to the amount of negligence attributable to such employee.

It is urged by some that such a provision is impracticable of administration and that juries will not divide the damages in accordance with the negligence committed by each. The

same objection can be urged against the provision of the bill passed by Congress in 1906, which provided that only slight negligence should not bar a recovery, but that the jury should diminish damages in proportion to such slight negligence. Under that provision the jury would have the same difficulty, if any, in apportioning the damages according to the negligence of each party. We submit, further, that this section of the bill is free from the very unjust principle contained in the common-law doctrine of comparative negligence which allowed the employee to recover full damages for injury to which his own negligence contributed in some degree. It is not a just criticism of a law, conceding the righteousness of its principles, to say that it is impracticable of administration. We submit that the principle in this section is ideal justice, against which no fair argument can be made. It is better that legislatures pass just and fair laws, even though they may be difficult of administration by the courts, rather than to pass unjust and unfair laws because they may be more easily administered by the courts. Courts ought not to be compelled to administer the common-law doctrine of contributory negligence, which puts upon the employee the whole burden of negligence, even though his negligence was slight and that of the employer was gross. That law might to some extent induce higher care on the part of the employee, but in the same degree, and for the same reason, it induces the employer to have less regard and less care for the safety of his employees.

It is urged that juries under this law will wholly ignore the negligence committed by the employee and charge all the injury to the negligence of the employer. We do not believe that this will be the result of the administration of this section. We believe it will appeal to juries as eminently just and they will undertake to enforce it literally to the best of their skill. If juries under the common-law rule of contributory negligence have been disposed to assess damages in spite of the fact that the defendant contributed to the injury by his own negligence, it may be said that the jury recognizes

the injustice of the law and undertakes to correct it by what they consider a just and righteous verdict. There is nothing in this law that will induce such a sentiment in the minds of the jury, but it will appeal to them as the true principle, and, in our judgment, they will seek to apply it fairly in the courts.

Beach, in his work on contributory Negligence, page 136, comments on the law as provided in this section as follows:

"Much may be said in favor of the rule which counts the plaintiff's negligence in mitigation of the damages in those cases which frequently arise, wherein, on one hand, a real injury has been suffered by the plaintiff by reason of the culpable negligence of the defendant, and yet, where, on the other hand, the plaintiff's conduct was such as to some extent contribute to the injury, but in so small a degree that to impose upon him the entire loss seems not to take a just account of the defendant's negligence. In those cases, which may be denominated 'hard cases,' the Georgia and Tennessee rule in mitigation of damages without necessarily sacrificing the principle upon which the law as to contributory negligence rests is a rule against which, in respect of justice and humanity, nothing can be said. Where the severity of the general rule might refuse the plaintiff any remedy whatever, as the sheer injustice of the rule, as laid down in *Davis v. Mann*, would impose the whole liability upon the defendant, it is quite possible to conceive a case where the application of the rule which mitigates the damages in proportion to the plaintiff's misconduct, but does not decline to impose them at all, would work substantial justice between the parties."

Shearman and Redfield on the Law of Negligence, fifth edition, page 158, in speaking of this rule, say:

"This is substantially an adoption of the admiralty rule, which is certainly nearer ideal justice, if juries could be trusted to act upon it."

The United States has adhered much closer to the common-law doctrine of contributory negligence than the leading countries of Europe. The laws of England, Germany, and

Italy go much further to discharge the employee from the responsibility of his own act than does the common-law doctrine of comparative negligence.

The laws of France, Switzerland, and Russia are in practical accord with the provisions of section 3 of this bill.

The rule provided for in this section is recognized to some extent in this country. Maryland and some of the other States have passed statutes seeking to divide the responsibility where both parties are guilty of negligence.

The provisions of this section are certainly just. What can be more fair than that each party shall suffer the consequences of his own carelessness? It certainly appeals more strongly to the fair mind than the proposition that the employee shall have no redress whatever, even though his injury is due mainly to the negligence of another. As a consequence of this legislation, we believe there will be fewer accidents. By the responsibility imposed, both parties will be induced to the exercise of greater diligence, and as a result the public will travel and property will be transported in greater safety.

The proviso in section 3 is to the effect that contributory negligence shall not be charged to the employee if he is injured or killed by reason of the violation, by the employer, of any statute enacted for the safety of employees. The effect of the provision is to make a violation of such a statute negligence *per se* on the part of the employer. The courts of some States have held this as a principle of the common-law. Other States have enacted it into statute.

Section 4 provides, in effect, that the employee shall not be charged with the assumption of risk in case he is injured by reason of the violation of the employer of a statute enacted for the safety of employees. This section likewise makes the violation of such a statute negligence *per se* on the part of the employer, and is already the law in many of the States of the Union.

Section 5 renders void any contract or rule whereby a common carrier seeks to exempt itself from liability created by this act. Many of the States have enacted laws making void

such contracts and regulations, and, so far as we are informed, these statutes have been sustained by the courts. The following States have incorporated into their statutes language similar to the language contained in this bill on this question: Arkansas, California, Colorado, Florida, Georgia, Indiana, Iowa, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Texas, Virginia, Wisconsin, and Wyoming. The Supreme Court of Ohio held that a contract exempting a railroad company from liability for injuries was void under the common law as against public safety. Likewise the Supreme Court of Arkansas and the court of appeals of Virginia have held the same doctrine. The Courts of New York have held that such contracts, though based on a consideration, are void as against public policy. The statutes of Ohio and Iowa fixing the liability of employer to employees, containing provisions similar to this section, have been held constitutional by the Federal Courts, although the cases in which these decisions were rendered did not expressly turn on that question. The courts of Alabama have held such contracts void, regardless of statute. In Georgia and Pennsylvania such contracts have been held valid, but since the decision in Georgia that State has adopted a statute making them void.

This provision is necessary in order to make effective sections 1 and 2 of the bill. Some of the railroads of the country insist on a contract with their employees discharging the company from liability for personal injuries.

In any event, the employees of many of the common carriers of the country are to-day working under a contract of employment which by its terms releases the company from liability for damages arising out of the negligence of other employees. As an illustration we quote one paragraph from a blank form of application for a situation with the American Express Company, and entitled "Rules governing employment by this company:"

"I do further agree, in consideration of my employment by

said American Express Company, that I will assume all risks of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the negligence of said company or any of its members, officers, agents, or employees, or otherwise; and that in case I shall at any time suffer any such injury, I will at once execute and deliver to said company a good and sufficient release, under my hand and seal, of all claims, demands, and causes of action arising out of such injury or connected therewith or resulting therefrom; and I hereby bind myself, my heirs, executors, and administrators, with the payment to said express company, on demand, of any sum which it may be compelled to pay in consequence of any such claim or in defending the same, including all counsel fees and expenses of litigation connected therewith."

While many of the States have enacted statutes making such contracts void, yet the United States Supreme Court, there being no Federal statute on the subject, have held a similar contract valid in the case of *Voigt v. Baltimore and Ohio Southwestern Railroad* (176 U. S., p. 498). In this case the railroad company entered into a contract with an express company whereby it agreed to carry the business of the express company, to furnish it with cars and certain facilities over its road, and to carry its messengers, in consideration of which the express company agreed to save harmless the railroad company for all claim for damages for personal injury received by its employees, whether the injuries were caused by the negligence of the railroad company or otherwise.

Voigt entered the service of the express company as messenger, and by the contract of his employment he agreed to assume all the risk of accident and injury and to indemnify and save harmless the express company from all claims that might be made against it for injury he might suffer, whether resulting from negligence or otherwise, and to execute a release for the same.

Voigt was injured and sued. The court said:



"He was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger, and that such a contract did not contravene public policy."

In the case of *O'Brien v. C. and N. W. Ry. Co.* (Fed. Rep. vol. 116, p. 502), which involved the statute of Iowa making such contracts invalid, the court said:

"That while such contracts would be effective to protect the railroad company from liability at common-law, under such statutory provisions declaratory of the public policy of the State they were invalid and constituted no defense to an action against it for the death of the messenger occurring in the State of Iowa by reason of the wrecking of the express car in which he was employed, through the negligence and want of ordinary care of defendant or its servants, whether the messenger be regarded as an employee of the defendant or not."

This section of the bill, however, provides that the common carrier may set off against any claim for damages whatever it has contributed toward such insurance, relief benefit, or indemnity that may have been paid to the injured employee, which would seem to be entirely fair and all that ought to be required of the employee.

Some of the roads of the country have established what are called "relief departments," which seek to operate a species of insurances for the employee against the hazards of the employment, but, so far as we know, all their forms of contracts, used by these relief departments to insure the employee, discharge the company from every possible liability for personal injuries to the employee. This release is made by its terms of agreement in consideration of the contributions of the company to the relief fund.

The following is one of the paragraphs from the form of application for membership in the relief department used by the Baltimore and Ohio Railroad Company:

"I further agree that, in consideration of the contributions of said company to the relief department and of the guaranty by it of the payment of the benefits aforesaid, the acceptance of benefits from such relief feature for the injury or death shall operate as a release of all claims against said company, or any company owning or operating its branches or divisions, or any company over whose railroad, right of way, or property the said Baltimore and Ohio Railroad Company or any company owning or operating its branches or divisions shall have the right to run or operate its engines or cars or send its employees in the performance of their duty, for damages by reason of such injury or death which could be made by or through me; and that the superintendent may require, as a condition precedent to the payment of such benefits, that all acts by him deemed appropriate or necessary to effect the full release and discharge of the said companies from all such claims be done by those who might bring suit for damages by reason of such injury or death; and also that the bringing of such a suit by me, my beneficiary or legal representative, or for the use of my beneficiary alone, or with others, or the payment by any of the companies aforesaid of damages for such injury or death recovered in any suit or determined by a compromise or any costs incurred therein, shall operate as a release in full to the relief department of all claims by reason of membership therein."

The form of other application used by other companies are similar in terms to the cited, and make acceptance of benefits from said fund a release of all claims for damages for injury or death.

By an act concerning common carriers engaged in interstate commerce and their employees, approved June 1, 1898, known as the "arbitration law," it is made a misdemeanor on the part of any employer subject to the provisions of that act:

"To require any employee or any person seeking employment, as a condition of such employment, to enter into a contract whereby such employee or applicant for employment

shall agree to contribute to any fund for charitable, sociable, or beneficial purposes; to release such employer from legal liability for any personal injury by reason of any benefit arising from the employer's contribution to such fund."

We believe this bill meets the objections of the Supreme Court to the act of June 11, 1906, known as the "employers' liability act" in the case of *Howard, administratrix etc., v. Illinois Central Railroad Company, et al.* 6 Cong. Record, 1st Sess. pp. 4434-4436.

## APPENDIX C.

### ENGLISH EMPLOYERS' LIABILITY ACT.

The English Employers' Liability Act of 1880<sup>1</sup> provides: "Where \* \* \* personal injury is caused to a workman (1) By reason of any defect in the condition of the ways, work, machinery or plant connected with or used in the business of the employer; or (2) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or (3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having to conform; or (4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or (5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway, the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work." "A workman shall not be entitled under this act to any right

<sup>1</sup> 43 and 44 Vict. 42.

of compensation or remedy against the employer in any of the following cases; that is to say: (1) Under sub-section one of Section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition; (2) Under sub-section four of Section one, unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned; provided, that where a rule or by-law has been approved or has been accepted as a proper rule or by-law by one of Her Majesty's Principal Secretaries of State, or by the Board of Trade, or any other department of the government, under or by virtue of any act of Parliament, it shall not be deemed for the purposes of this act to be an improper or defective rule or by-law; (3) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence."

#### ENGLISH ACT CONSTRUED.

In Roberts' Duty and Liability of Employers it is said of this act: "It does not altogether abolish the defense of common employment.<sup>2</sup> It does not make the employer responsible for the acts of persons who either are not his servants, or are not acting within the scope of their employment as such. It does not make him responsible for acts or omissions which do not constitute a breach of duty.<sup>3</sup> It

<sup>2</sup> Citing *Gibbs v. Great Western R.*, p. 1161; *Hamilton v. Hyde R. Co.* 12 Q. B. Div. 211; *Robins Park Foundry* 22; *Sc. L. R.* 709; *v. Cubit*, 146 L. T. 535. *Walsh v. Whitely*, 21 Q. B. Div.

<sup>3</sup> Citing *Grant v. Drysdale*, 10 371.

does not create a new cause of action where none was in existence previously,<sup>4</sup> but only adds a remedy against a person other than the wrongdoer, or, in other words, directs an old cause of action against a new defendant. It does not give an absolute right of action, but merely removes one defense,<sup>5</sup> placing the workman even when all the conditions have been satisfied, only in the position of one of the public.<sup>6</sup> From which it follows that it does not make the employer responsible where the workman has been guilty of contributory negligence;<sup>7</sup> or has, within the meaning of the maxim, *volenti non fit injuria*, voluntarily undertaken the consequences of that which but for his acceptance of the risk would have constituted a breach of duty on the part of the employer.<sup>8</sup> It does not impose any liability on the employer in favor of either the representatives or the relatives of an injured workman, unless the workman's death results from the injury. And lastly, it does not, as we have seen, deprive the workman of any right of action against the employer which is given him by the common law."<sup>9</sup>

<sup>4</sup> Citing *Thomas v. Quartermain*, 18 Q. B. Div., pp. 692, 693; *Morrison v. Baird*, 10 R., p. 277; *Robertson v. Russell*, 12 R., p. 638.

<sup>5</sup> Citing *Yarmouth v. France*, 19 Q. B. Div., p. 659; *Morrison v. Baird*, 10 R., pp. 277, 278 (S. C.)

<sup>6</sup> Citing *Thomas v. Quartermain*, 18 Q. B. Div., p. 693; *Stuart v. Evans*, 31 W. R. 706.

<sup>7</sup> Citing *Thomas v. Quartermain*, at p. 698.

<sup>8</sup> Citing *Yarmouth v. France*, 19 Q. B. Div., 659.

<sup>9</sup> *Roberts Employers' Liability Act*, p. 248.

<sup>1</sup> NOTE.—similar statutes have been held constitutional. *Holden v. Hardy*, 169 U. S. 366; 18 Sup. Ct. Rep. 383. But see *Ritchie v. People*, 155 Ill. 98; 40 N. E. Rep. 454; 29 L. R. A. 79; and *Low v. Rees Printing Co.* 41 Neb. 127; 59 Pac. Rep. 362; 24 L. R. A. 702.

## APPENDIX D.

### SAFETY APPLIANCE ACTS.

AN ACT to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive-engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train brake system or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakeman to use the common hand brake for that purpose.

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

SEC. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of Section one of this act, it may lawfully refuse to receive from connecting lines of road or shipper any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act.

SEC. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

SEC. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of draw bars for freight cars measured perpendicular from the level of the tops of the rails to the centers of the draw bars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the draw bars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate



traffic which do not comply with the standard above provided for.

SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge, *Provided*, That nothing in this act contained shall apply to trains composed of four-wheeled cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs. (As amended April 1, 1896, 29 U. S. Stat. at L., 85, ch. 87.)

SEC. 7. That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this act.

SEC. 8. That any employe of any such carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

Approved, March 2, 1893, 27 U. S. Stat. at Large, 531, ch. 196.

AN ACT to amend an act entitled, "An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six. (Public No. 133, approved March 2, 1903.)

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United State of America in Congress assembled,* That the provisions and requirements of the Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type, and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, or which are used upon street railways.

SEC. 2. That whenever, as provided in said Act, any train

is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

SEC. 3. That the provisions of this Act shall not take effect until September first, nineteen hundred and three. Nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States District attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, shall, except as specifically amended by this Act, apply to this Act.

## APPENDIX E.

### ASH PANS

AN ACT To promote the safety of employees on railroads.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That on and after the first day of January, nineteen hundred and ten, it shall be unlawful for any common carrier engaged in interstate or foreign commerce by railroad to use any locomotive in moving interstate or foreign traffic, not equipped with an ash pan, which can be dumped or emptied and cleaned without the necessity of any employee going under such locomotive.

SEC. 2. That on and after the first day of January, nineteen hundred and ten, it shall be unlawful for any common carrier by railroad in any Territory of the United States or of the District of Columbia to use any locomotive not equipped with an ash pan, which can be dumped or emptied and cleaned without the necessity of any employee going under such locomotive.

SEC. 3. That any any such common carrier using any locomotive in violation of any of the provisions of this Act shall be liable to a penalty of two hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge

with the proper district attorneys information of any such violations as may come to its knowledge.

SEC. 4. That it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this Act, and all powers heretofore granted to said Commission are hereby extended to it for the purpose of the enforcement of this Act.

SEC. 5. That the term "common carrier" as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

SEC. 6. That nothing in this Act contained shall apply to any locomotive upon which, by reason of the use of oil, electricity, or other such agency, an ash pan is not necessary.

Approved, May 30, 1908.

## APPENDIX F.

### HOURS OF LABOR FOR RAILROAD MEN.

AN ACT To promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train.

SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved

and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty; *Provided*, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches reports, transmits, receives or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: *Provided further*, The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

SEC. 3. That any such common carrier or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys in-

formation of any such violations as may come to his knowledge. In all prosecutions under this Act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: *Provided*, That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen: *Provided further*, That the provisions of this Act shall not apply to the crews of wrecking or relief trains.

SEC. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this Act and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this Act.

SEC. 5. That this Act shall take effect and be in force one year after its passage.

Approved, March 4, 1907, 11:50 a. m.



## APPENDIX G.

### DECISIONS UNREPORTED (MARCH 23, 1909,) UNDER THE SAFETY APPLIANCE ACTS.

[My thanks are due to Mr. Edward A. Moseley, Secretary of the Interstate Commerce Commission, for these decisions. The first two are taken from the pamphlet published by the Interstate Commerce Commission, April 1, 1907. The remainder are on separate sheets furnished me by Mr. Moseley.]

#### UNITED STATES *v.* EL PASO AND SOUTHWESTERN RAILROAD COMPANY.

(In the District Court of the Second Judicial District of the Territory  
of Arizona.)

1. Though the complaint for violation of the Federal safety appliance acts in this case does not allege that the defendant is a common carrier engaged in interstate commerce, it does allege that the defendant is a common carrier engaged in commerce by railroad among the several Territories of the United States, particularly the Territories of Arizona and New Mexico, and that is sufficient, as the interterritorial commerce therein alleged is equivalent, under the Safety-Apppliance Act of 1903, to interstate commerce under the original act of 1893.
2. Where a coupler couples by impact, but cannot be uncoupled unless the employe goes between or over the cars, or around the end of the train, in order to reach the appliance on the connecting car, such a coupling is defective and prohibited by law, as it makes it reasonably necessary for the employe to go between the ends of the cars to uncouple such a car.

J. L. B. ALEXANDER, *United States Attorney*, for the  
United States.

HERRING, SORIN & ELMWOOD and HAWKINS & FRANKLIN,  
for the defendant.

(Decided January 30, 1907.)

*DOAN Judge:*

This action was brought under the act of Congress known as the "safety-appliance act," approved March 2, 1893, as amended by an act approved April 1, 1896, and as amended by an act approved March 2, 1903, contained respectively in the Twenty-seventh Statutes at Large, page 531, in the Twenty-ninth Statutes at Large, page 85, and in the Thirty-second Statutes at Large, page 943.

The plaintiff alleged that the defendant "is a common carrier engaged in commerce by railroad among the several Territories of the United States, and particularly the Territories of Arizona and New Mexico," and then alleged that in violation of the said act as amended the "defendant on March 3, 1906, hauled over its line of railroad a certain car generally engaged in the movement of interstate traffic, when the coupling and uncoupling apparatus on the A end of said car was out of repair and inoperative, necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by section 2 of the said "safety-appliance act, as amended by section 1 of the act of March 2, 1903," and by reason of the violation of the said act the defendant was liable to the plaintiff in the sum of \$100.

The second and third causes of action were for similar acts in violation of the law alleged as to certain other cars hauled by the defendant on its said road, on or about the same date, and the fourth was for using at the same time on its line of railroad one locomotive for switching at its yards in Douglas, Ariz., cars containing interstate traffic.

It was urged by the defendant that the "safety-appliance act" was confined in its operations to common carriers engaged in interstate commerce by railroad, and that there

was no allegation in the complaint in this instance that the defendant was engaged in interstate commerce.

Section 1 of the act of 1893 provides: "It shall be unlawful for any common carrier engaged in interstate commerce to use on its line," etc.

Section 2 provides:

It shall be unlawful for any such common carrier to haul, or to permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of a man going between the ends of the cars, etc.

The act of March 2, 1903, provides in section 1:

That the provisions and requirements of the act . . . approved March 2, 1893, and amended April 1, 1896, shall be held to apply to common carriers by railroad in the Territories and the District of Columbia.

The plaintiff in this case in each instance has alleged that the car alleged to have been handled in violation of the act was "a car generally used in the movement of interstate traffic," or "was engaged in moving traffic in and between the Territories of the United States," and although the complaint did not in so many words allege that the defendant was "a common carrier engaged in interstate commerce by railroad," it did allege that it was "a common carrier engaged in commerce by railroad among the several Territories of the United States, particularly the Territories of Arizona and New Mexico," which allegation, under the provisions of section 1 of the act of 1903, that declares that the "safety-appliance act" shall be held to apply to common carriers by railroad in the Territories and the District of Columbia, is sufficient. The interterritorial commerce therein alleged being equivalent under the act of 1903 to interstate commerce under the original act of March 2, 1893.

The violations of the act were established by the un-

disputed testimony in the case, except in the one instance where it was proven that the coupling appliances on one end of the car hauled were perfect, and that the coupling appliances on the other end of the car were such as would couple by impact; and it was alleged by the defendant that although the coupling appliances on the end of the car complained of were so damaged, and thereby imperfect, that they could not be operated by a man without the necessity of his going between the cars, that when coupled to the adjoining car on which the appliances were in perfect order the car could be uncoupled from the adjoining car without a man or men going in between the cars. The proof developed that this car was coupled into the body of a train, and that if a brakeman was sent along the train to uncouple the car on the side of the train on which this coupling rod should be that the coupling rod on the adjoining car would naturally be on the other side of the train, and it presented a question (in the absence of proof on the part of the defendant that the adjoining car was furnished with a double arm or rod—that is, one extending on each side of the car, as is in some instances provided) whether the car so coupled that it could not be uncoupled on the side to which the brakeman would naturally be sent to uncouple it without the necessity of a man going between the cars for the purpose of uncoupling, but that it could be uncoupled by operating the coupling rod on the adjoining car by the brakeman going around the end of the train in order to reach it on the other side, or by his climbing up the car, crossing over the top and climbing down on the other side, was, in the contemplation of the law, one which “could be uncoupled without the necessity of a man going between the cars.”

It was contended by the defendant that in construing this statute we must take into consideration the fact that it is a penal statute, and therefore should be strictly construed, while the plaintiff insisted that it is a remedial

statute, and is enacted for the protection of the lives and limbs of the numerous railroad employees and therefore should be liberally construed. We feel justified in giving a sufficiently liberal construction to the language employed to enable the statute to conserve the ends evidently intended by the legislators, and while it may not be successfully maintained that a car coupled as above renders it absolutely necessary for a man to go between the ends of the cars to uncouple it, our knowledge of the manner in which freight trains of our interstate railroads are handled convinces us that it is reasonably necessary for the man to go between the ends of the cars to uncouple such a car. There is no assurance that the conditions of the track or the length of the train would be such at the time that the car might need to be uncoupled that the brakeman could go around the end of a train to the operating rod on the other side of the adjoining car and effect the uncoupling in the time allowed for such purpose, or that the condition of the car or the adjoining car would be such that he could climb over the top of the car and down the other side, even if sufficient time were allowed, without incurring fully as much danger to his person as by stepping in between the ends of the cars and effecting the uncoupling by hand. It is reasonably certain that in a great majority of cases, if not, in fact, invariably, the brakeman, confronted with the necessity of adopting one of these three courses, would go in between the cars and effect the uncoupling by hand. We consider that hauling a car with a coupling in such damaged or imperfect condition as to present the necessity of this election to the employee is a violation of the act in the ordinary meaning of the words used, according to the true intent of the legislators.

Judgment is rendered for the plaintiff in accordance with the prayer of the complaint in the four several causes of action.

UNITED STATES OF AMERICA *v.* EL PASO & SOUTH-  
WESTERN RAILROAD COMPANY AND EL PASO  
& SOUTHWESTERN RAILROAD COMPANY  
OF TEXAS.

(U. S. District Court, Western District of Texas.)

1. The allegation that this action was brought "upon suggestion of the Attorney-General of the United States, at the request of the Interstate Commerce Commission, and upon information furnished by said Commission," substantially complies with section 6 of the act of March 2, 1893, as amended, when it appears that such information was furnished to the Commission by inspectors of safety appliances, who are acting under oath of office.
2. In stating a cause of action to recover a penalty under the Safety Appliance Acts, it is not necessary that there be an allegation that the acts complained of were intentionally and willfully done.
3. The highest degree of care in inspection and making such repairs as that inspection disclosed is not in any way a defense in an action brought to recover a penalty for violation of the Safety Appliance Act.

CHARLES A. BOYNTON, *United States Attorney*, and  
LUTHER M. WALTER, *special assistant United States attorney*,  
for the United States.

PATTERSON, BUCKLER & WOODSON and HAWKINS &  
FRANKLIN, for the defendants.

The following pleading was filed by the defendants:

Now come the defendants in the above-styled cause and say that they are common carriers engaged in commerce by railroad in the Territories of Arizona and New Mexico and in the State of Texas, and they except specially to the complaint of the plaintiff filed herein for the reason that the same is not verified as required by the provisions of section 6 of the act of March 2, 1893, and amended by the act of April 1, 1896 (Chapter 87, 29 Stat. L., p. 85).

2d. Said defendants except specially to said complaint for the reason that it does not appear from the same that

duly verified information respecting the matters therein alleged was ever filed with the United States District Attorney.

3rd. Defendants except specially to the first count in said complaint for the reason that it is not alleged that the acts therein complained of were intentionally or willfully done.

4th. And defendants except specially to the second count in said complaint contained for the reason that it is not alleged that the acts therein complained of were intentionally or willfully done.

5th. And defendants except specially to the third count in said complaint contained for the reason that it is not alleged that the acts therein complained of were intentionally or willfully done.

6th. Defendants except specially to said complaint for the reason that the same does not show that it was filed in any way in accordance with or under the provisions of section 6 of the act of March 2, 1893, and amended by the act of April 1, 1896 (chapter 87, 29 Stat. L., p. 85).

7th. Defendants except specially to said complaint for the reason that it does not appear from the same that this court has jurisdiction over this cause.

8th. And further answering, defendants say that they are not guilty of the wrongs and acts complained of in this cause, and they deny all and singular the allegations in the plaintiff's complaint contained and of this they put themselves upon the country.

9th. And for further answer in this behalf, these defendants say that if said grab irons, couplers, and appliances mentioned in the petition of the plaintiff were in anywise defective, insufficient, or not in conformity with the laws of the United States that then such facts were not within the knowledge of these defendants or either of them, nor could the same have been discovered by these defendants by the highest degree of care in inspection; that immediately before using the said cars mentioned in said petition, these

defendants gave the said cars a rigorous inspection and used the highest degree of care and diligence to discover any defective condition about the same, or any grab irons, couplers, or other appliances thereof, and that by the use of such care they did not and could not discover the same; that if said cars were moved as alleged by plaintiff, which defendants deny, when any of the same, their appliances, couplers or grab irons were in a defective condition, that then the same was done by defendants inadvertently, without the knowledge of either of them, and without the consent of either of them, all of which these defendants are ready to verify.

MAXEY, *District Judge*, rendered the following judgment:

On this the 8th day of April, A. D. 1907, came on for trial by regular call the above numbered and entitled cause, whereupon came the plaintiff and the defendants, by their respective attorneys, and came on to be heard the demurrers and special exceptions of defendants, and the court having heard and considered the same is of the opinion that the same are not well taken and that the law is not with the defendants in the matter of the exceptions; and it is therefore ordered by the court that all of said exceptions be, and the same are hereby, overruled, to which action of the court the defendants excepted; and also came on to be heard and considered by the court the exception and demurrer filed by the plaintiff to the 9th paragraph of the defendants' answer herein, and the court having heard and considered the same is of the opinion that the same is well taken and that the law is with the plaintiff in the matter of said exception; and it is therefore ordered by the court that the said exception be, and the same is hereby, sustained, to which ruling of the court the defendants excepted.

Whereupon, upon motion of the district attorney, it is ordered by the court that this cause be, and the same is hereby, dismissed as to the defendant El Paso & Southwestern Railroad Company.



Whereupon both parties announce ready for trial, and a jury having been expressly waived by written stipulation filed herein, the matters of fact as well as of law were submitted to the court, and the court, after hearing the pleadings read, considering the evidence introduced and the argument of counsel, is of the opinion, and so finds, that the defendant El Paso & Southwestern Railroad Company of Texas, a corporation, is guilty of violations of the act of Congress known as the Safety Appliance Act, as set forth and charged in the three counts contained in plaintiff's petition, and is liable to plaintiff, the United States of America, in the sum of three hundred (\$300) dollars.

It is therefore ordered, adjudged, and decreed by the court that the plaintiff, the United States of America, do have and recover of and from the defendant, El Paso & Southwestern Railroad Company of Texas, the sum of three hundred (\$300) dollars, with interest thereon from this date at the rate of six per cent. per annum, together with all costs in this behalf incurred and expended, for which execution may issue.

To which judgment and ruling of the court the defendant El Paso & Southwestern Railroad Company of Texas in open court excepted.

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## UNITED STATES v. WABASH RAILROAD COMPANY.

[In the District Court of the United States for the Eastern District of Illinois.]

(Syllabus by the court.)

1. In an action brought to recover the penalty provided in section 6 of the Safety Appliance Act for violation of that statute it is no defense to show that defendant has used diligence or care of any degree to keep the cars in a reasonably safe condition. The statute commands a duty. The defendant must perform that duty, and it moves cars in a defective condition at its peril.

## STATEMENT OF FACTS.

The Interstate Commerce Commission lodged with the United States attorney information showing violations of the safety appliance law by the Wabash Railroad Company. The declaration was in four counts, each count charging a violation of section 2 of the statute, the allegation being that the couplers were out of repair and inoperative. At the trial defendant offered evidence tending to show diligence and care in keeping the cars in a reasonably safe condition.

WILLIAM E. TRAUTMANN, *United States attorney*, GEORGE A. CROW, *assistant United States attorney*, and ULYSSES BUTLER, *special assistant United States attorney*, for the United States.

BRUCE CAMPBELL, for defendant.

(November 19, 1907.)

FRANCIS M. WRIGHT, *District Judge* (charging jury):

The defendant in this case is charged by the United States with having violated what is commonly known as the Safety Appliance Act, an act of Congress with reference to that subject, in four counts. This law was enacted for the purpose of securing the safety of persons engaged in operating trains in interstate traffic, and section 2 provides, being the section under which this declaration is framed, that—"On and after the 1st day of January, 1898, it shall be unlawful for any common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Now if you believe from the evidence in this case that the engine mentioned in the first count, I think it is, of the

declaration was used in moving interstate traffic, and that it was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of men going between the ends of the cars, then you will find the defendant guilty on that count. And so it is with reference to all the other three counts in the declaration. If you believe from the evidence in the case that the cars, one or all of them, were used in moving interstate traffic, and that they were not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of men going between the ends of the cars, you will find the defendant guilty on all or any of the counts where you so believe. You have heard the testimony of the witnesses upon this subject. The witnesses for the Government have testified that the couplers were so out of order that they could not be coupled without a man going between the cars for that purpose. Now if you believe from the evidence that is true, and if you further believe from the evidence that the cars were used in moving interstate traffic, then you will find the defendant guilty.

The testimony of the defendant's witnesses as to the inspection of the cars was submitted here for the purpose of tending to show, as far as in your judgment it does tend to show, that the defendant's cars were in good order. The mere fact that the defendant had used diligence or care to keep the cars in a reasonably safe condition is not a question before you. That is no defense to this suit. This statute is commanding, and requires the defendant at its peril to keep the couplers in such condition that the men whose business it is to couple them will not be required to go between the cars to do it; and if you believe from all the evidence in this case that they were so out of order that they could not be coupled without men going between the cars to do the coupling, then the defendant would be guilty under this declaration, and you will so find. That is about all the law and the evidence there is upon this subject in this case.

You have heard the testimony of all the witnesses, and you are the judges of the credibility of all the witnesses and of what the evidence proves, and you must determine the case solely upon the evidence in the case. If you find the defendant guilty, you will say: "We, the jury, find the defendant guilty on the first, second, third and fourth counts of the declaration." You may find the defendant guilty on some of the counts and not guilty on the others. In that case the form of your verdict will be: "We, the jury, find the defendant guilty" on whatever number of counts you do find the defendant guilty, and "not guilty" on whatever you find the defendant not guilty. If you find the defendant not guilty, you will say: "We, the jury, find the defendant not guilty."

There seems to be no dispute as to these cars, as to the fact that they were engaged in interstate commerce. That question is hardly necessary for you to consider or necessary for me to submit to you. There is no dispute about that. Interstate commerce, as you understand, of course, is traffic between one state and another state—shipments from one state to another state. That is interstate traffic.

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## THE UNITED STATES *v.* PACIFIC COAST RAILWAY COMPANY.

(In the District Court of the United States for the Southern District of California.)

(Syllabus by the court.)

1. Under the Federal Safety Appliance Acts, in order to recover the statutory penalty provided for in section 6 thereof, the United States must prove, (1) that the defendant at the times mentioned in the complaint was a common carrier by railroad engaged in interstate commerce; (2) that it hauled, or permitted to be hauled over its line, the locomotives, trains and cars mentioned in the

several counts of the complaint; (3) that the locomotives, trains and cars were not provided with the equipment required by the statute.

2. A shipment from a point without the State of California was consigned to San José, in said State. Before the shipment reached California and while in transit, the consignee, by an agreement with one of the carriers, changed the destination from San José to Ca-reaga. *Held*, That the traffic being carried from San José to Ca-reaga was interstate. *Gulf, Colorado & Santa Fe v. Texas*, 204 U. S., 403, distinguished.

OSCAR LAWLER, *United States attorney*; ALOYSIUS I. McCORMICK, *assistant United States attorney*, and ROSCOE F. WALTER, *special assistant United States attorney*, for plaintiff.

JAMES A. GIBSON and GEORGE W. TOWLE, for defendant.

*Decided June 13, 1908.*

WELLBORN, *District Judge* (charging jury):

There being no conflict whatever in the evidence in this case, the parties have submitted motions respectively for peremptory instructions. Taking them up in the order in which they have been submitted, or in the order in which they were presented, the defendant asks the court to peremptorily instruct the jury to return a verdict in favor of the defendant on all the counts in the complaint. The plaintiff asks that the court peremptorily instruct the jury to return a verdict in its favor on all the counts of the complaint, excepting the eleventh and twenty-third, being duplicates of the ninth and twenty-second counts.

These two motions are the matters which call on me now for immediate disposition, and of course the disposition that I make of these motions will determine the case, because the jury will then be instructed to find or return a verdict in accordance with the conclusions which I announce.

I may say, before taking up the merits of these motions, that it is obvious, not only to the court, but even to a casual

observer of the progress of this trial, that counsel both for the plaintiff and for the defendant have made their researches into the law of the case with great industry, and the presentation of their respective views has been marked by uncommon ability. If I had no jury in the box and could take the case under advisement for the purpose of preparing an opinion, I should like to review these questions for the reasons which I have just indicated; but this is impracticable, and I shall not undertake to do any more than to announce my conclusions, with such reference to the law and the facts in the case as may make the announcement intelligible.

The first Safety Appliance Act was passed in 1893, and this act as amended April 1, 1896, contains, among others, the following provisions, which are applicable to the case at bar. The first section of the original act reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine, in moving interstate traffic, not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it, so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring the brakeman to use the common hand brake for that purpose.*

I am reading these various provisions because I think it is well that the jury, as well as counsel, should understand the ruling I am going to make. The second section reads as follows:

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul, or permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Section 6, as amended in 1896:

That any such common carrier using any locomotive engine running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a

penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such District Attorney to bring such suits, upon duly verified information being lodged with him of such violations having occurred, etc.

The act was further amended March 2, 1903, and this last amendment provided, among other things, in section 1 of the act that the provisions and requirements of the act entitled "An act to promote the safety of employees and travelers upon railroads, by common carriers engaged in interstate commerce, approved March 2, 1893, and amended April, 1896, shall be held to apply to all common carriers by railroad in the Territories and in the District of Columbia, and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof, and of said acts, relating to train brakes, automatic couplers, grab irons, and the height of draw bars, shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles, used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section 6 of said act of March 2, 1893, as amended by the act of April 1, 1896, or which are used upon street railways."

I am of opinion that that part of the amendatory act of 1903 which provides, "and the provisions and requirements hereof and the said act relating to train brakes, automatic couplers, grab irons, and the height of drawbars, shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and to all other locomotives, tenders, cars, and similar vehicles, used in connection therewith," broadens the original act of 1893 so as to make its requirements concerning train brakes, automatic couplers, grab irons, and the height of drawbars apply not only to trains, locomotives,

tenders, and cars employed in the movement of interstate traffic, but to all trains, locomotives, tenders, and cars used on any railroad engaged in interstate commerce. In other words, for the Government to recover under the amendatory act of 1903, it is not necessary, as it was under the original act of 1893, to show that the car with the defective equipment was employed in interstate movement at the time this defect was discovered, but it is only necessary to show that said car was hauled over the line or used by a railroad engaged in interstate commerce. *U. S. v. Chicago, M. & St. P. Ry. Co.*, 149 Fed., 436. The case just cited is the case which was read by Judge Gibson, and which had not been called to my attention previously; but the views which I have announced are in complete accord with the views expressed by Judge McPherson in the case which I have just cited. Unless the amendatory act is so construed, those parts of it last quoted are entirely without effect and useless.

To further illustrate the effect of this amendatory act, I will read the following statement by a Member of the House of Representatives while that body had the act under considerations:

**MR. WANGER:** Mr. Speaker, the purpose of this act is to make more efficient the provisions of the act of March 2, 1893, for the promotion of the safety of employes upon railways. It has been held by some courts that the tender of a locomotive is not a car, and is therefore not affected by the provisions of the act. It has also been held that the act only applies to cars in interstate movement, and cars are very frequently, although generally designed for and used in the movement of interstate traffic, in use which is not interstate movement that requires the services of operatives upon them. Whenever an action for damages is brought by reason of the death or injury of a railroad employe, of course every defense is made; and, although the car may not be equipped as directed by the act of Congress, yet that direction, as it stands, only applies when the car is being used in the movement of interstate commerce; therefore the burden is on the plaintiff in every such action to establish that fact, and is frequently an impossibility, because frequently the injury or death does not happen when the car is so engaged in interstate commerce.

It is, therefore, of the highest importance to make the act of Congress, as everybody supposed it would be, effective, so far as we have the power and authority, for the protection of employes by requiring the equipment referred to in the act on all cars used on railroads engaged in interstate commerce. That is the purpose of the first section



of the bill. The purpose of the second section is to require a more general and uniform use of air and air brakes, so as to have less need for the operation of hand brakes. The present act, as I recollect it, is that there must be sufficient air-braking apparatus used to enable the engineer to control the train. That, of course, differs, perhaps, in the judgment of every engineer. Therefore it seems appropriate that there should be a certain percentage of the cars of every train required to be operated by air brakes, whether it is actually essential for the proper control of the train or not.

To the same effect, the Interstate Commerce Commission, in its Seventeenth Annual Report, page 84, after the act had become a law:

The necessity of showing that a car was engaged in interstate commerce was another difficulty in the way of enforcing the law. It was necessary to get at the billing showing destination of cars, and to prove in each case that the car complained of was actually moving or used in interstate commerce at the time its defect was discovered. The amendment in question has obviated this difficulty. The law now applies to all equipment on the lines of carriers engaged in interstate commerce, without regard to the service in which it is used.

I am of the opinion that under said acts as above explained there were only three things which the Government must prove in order to recover:

- (1) That the defendant, at the times mentioned in the complaint, was a common carrier by railroad, engaged in interstate commerce;

- (2) That it hauled, or permitted to be hauled, over its lines the locomotives, trains, and cars mentioned in the several counts of the complaint;

- (3) That said trains, locomotives, and cars were not provided with the equipment required by said act.

There is no controversy as to the existence of the second and third ingredients of the plaintiff's causes of action, nor is there any controversy that the defendant was and is a common carrier by railroad. The only issue between the defendant and the plaintiff is as to whether or not the proof shows that it was engaged, at the times mentioned in the complaint, in interstate commerce.

There is no conflict whatever in the evidence relating to

this issue, and from such evidence, following the principles declared in *United States v. Colorado Northwestern R. R. Co.*, 157 Fed., 321, some of which had been previously enunciated in the *Daniel Ball* case, 10 Wall., 557, I am satisfied that the defendant was engaged at the said times in interstate commerce. The letter of January 25 of the consignor, the National Tube Company, to the general freight agent of the Southern Pacific Company, asking that the destination of the shipments therein named be changed on their arrival at the place to which they were originally consigned, and the direction contained in the letter or traingram, signed "J. M. Brewer," of date January 29, written more than a month before either of said shipments arrived at San Jose, and some time before they had even reached California, clearly distinguishes the case from *Gulf, Colorado & Santa Fe R. R. Co. v. Texas*, 204 U. S., 403. I may say here that of course the actual physical diversion of the shipments was not and could not have been made until the arrival of the cars at San Jose, or Los Angeles, or Mojave, whichever may have been the destination; but the agreement between the National Tube Company, the consignor, and the Southern Pacific Company, as evidenced by the letters which I have just referred to—and the Southern Pacific Company was one of the carriers who were parties to the contract for the interstate shipment—this agreement between the consignor and the Southern Pacific Company was consummated when the traingram was sent by the Southern Pacific Company pursuant to the request of the National Tube Company, the consignor, to the local agent of the Southern Pacific Company at San Jose. After that order had been sent to the agent at San Jose it was as though the original contract had read that Careaga, or whatever was the point to which it was to be diverted, was the ultimate destination. In other words, the original contract was so changed as to substitute Careaga, or the other points on the defendant's local line, for the points on the Southern

Pacific given in the waybill as it was originally executed. I might say that there is another fact that adds some strength, probably, to this conclusion, although the conclusion would have been reached without it—that the testimony of Mr. Garrett, I think it is, showed that the National Tube Company furnished and provided the local agent at San Jose with money to prepay the transportation beyond that point to the new destination under the diversion order.

Recurring now to the case of *Gulf, Colorado & Santa Fe Railroad Company v. Texas*, 204 U. S., 403, the court, at page 412, said, among other things:

In other words, the transportation which was contracted for, and which was not changed by any act of the parties, was transportation of the corn from Hudson to Texarkana—that is, an interstate shipment. \* \* \* Neither the Harroun nor the Hardin company changed, or offered to change, the contract of shipment or the place of delivery. \* \* \* No new arrangement having been made for transportation, the corn was delivered to the Hardin Company at Texarkana. Whatever may have been the thought or purpose of the Hardin Company in respect to the further disposition of the corn was a matter immaterial, so far as the completed transportation was concerned.

It is a fair inference from this quotation that if the original contract of shipment had been changed by the parties so as to substitute Goldthwaite for Texarkana, the decision of the court would have been different; and I am of opinion that the changes of destination shown in the case at bar by the letters above mentioned are the situations which, it is to be inferred from the language of the Supreme Court in the case last cited, would have made the transportation there involved an interstate matter and, in my opinion, bring the case at bar fully within *United States v. Colorado Northwestern R. R. Co., supra*.

From the views above expressed as to the law of the case, there being no conflict in the evidence relating to the facts, it follows that the defendant's motion must be denied, and the plaintiff's motion for peremptory instructions must be allowed, and orders to that effect will be accordingly entered.

UNITED STATES *v.* WHEELING AND LAKE ERIE  
RAILROAD COMPANY.

(In the District Court of the United States for the Northern District  
of Ohio.)

*Decided June 16, 1908.*

(Syllabus by the court.)

1. The Safety Appliance Act of March 2, 1903, amending the act of March 2, 1893, as amended April 1, 1896, is constitutional and valid. Employers' Liability cases (207 U. S. 463), distinguished.
2. All the cars used by a railroad engaged in interstate commerce in the natural course of their use are instrumentalities of interstate commerce; whether they carry interstate traffic themselves or are hauled in a train which contains interstate traffic, such cars are impressed with an interstate character.
3. In order effectively to protect the employe engaged in handling a car loaded with interstate traffic, Congress lawfully may regulate the appliances used on every car upon which such employe is employed.
4. It is not necessary that the petition in an action to recover the statutory penalty under the Safety Appliance Act allege that the defect in the car was due to any want of ordinary care upon the part of the defendant. (*Railway Co. v. Taylor, Adms.*, 210 U. S. 281.)
5. If a car is one that is regularly used in the movement of interstate traffic, and is at the time involved in the movement of a train containing interstate traffic, the lading of the car is wholly immaterial.

*William L. Day*, United States attorney; *Thomas H. Garry*, assistant United States attorney; and *Luther M. Walter*, special assistant United States attorney, for the United States.

*Squire, Sanders & Dempsey*, for defendant.

OPINION ON DEMURRER TO PETITION.

TAYLER, D. J.:

The petition in this case, in twenty-three causes of action, seeks to recover from the defendant penalties for alleged failures to equip certain cars with couplings and grab irons, as required by what is known as the safety appliance act.

this legislation, having in view the decision of the Supreme Court in the Employers' Liability cases. It is true that the Supreme Court in that case held the Employers' Liability act unconstitutional, because it made the railroad company liable to any of its employees, without restricting the liability to those who were engaged in interstate commerce; but a parity of reasoning would not require that we should say the same thing of the Safety Appliance act because it refers to all cars used on any railroad engaged in interstate commerce. It seems to me that, in the respect complained of, there is no analogy between the decision of the Supreme Court in the Employers' Liability cases and the theory of the defendant's counsel as to the constitutionality of the Safety Appliance act. An employe of a railroad company engaged in interstate commerce does not, merely because he is such employe, sustain the same relation to interstate commerce as a car used on a railroad engaged in interstate commerce sustains to interstate commerce on that road. Certainly, the Federal Government owes no duty to, and has no authority over, an employe of a railroad which is engaged in interstate commerce, if the employe himself is not engaged in the work of interstate commerce. That employe is subject, in respect to his relations with the railroad company, to the laws of the State in which the service is performed. There is no reason why the power of the State should not be sufficient for his protection, or why the Federal Government should interfere with respect to that or any other matter relating to that employe in respect to his work with the railroad company, so long as it does not relate to the interstate commerce of the company.

But this is not true of a car used by a railroad engaged in interstate commerce. All of the cars used by a railroad engaged in interstate commerce, in the natural course of their use, are instrumentalities of interstate commerce; whether they carry interstate traffic themselves or are hauled in a train which contains interstate traffic the effect is the same.

They stand in a certain and important relation to that interstate commerce over which Congress has control; and it is quite apparent that Congress, in undertaking to determine the manner in which interstate commerce shall be carried on, and especially in making effective the useful and beneficent purpose of providing for the safety of employes, would necessarily have a regard for the cars which the interstate commerce railroad had in use. And thus, discovering a very marked and practical distinction between a car used by an interstate commerce railroad and a person in the employ of an interstate commerce railroad, we see how one, in the nature of things, becomes properly the subject of Federal legislation while the other, depending upon the character of his work, may or may not become properly the subject of Federal legislation. This proposition is amplified in the reply herein made to the third objection to the applicability of the act.

After all, on this subject of the constitutionality of the act, it seems to me that that question has been fully answered by the determination of the Supreme Court in *Johnson v. Railroad Company*, *supra*, wherein it is declared that this act of 1903 only construes and applies the act of 1893, and does not add any new affirmative provision.

As to the second objection, whatever may be the right of the railroad company to defend against the claim made in a suit of this kind by saying that the coupling became defective or the grabiron lost so recently before the time named in the petition as to make it impossible, in the exercise of ordinary care, to replace or repair; that is purely a matter of defense if it ever can be asserted at all. It can not be urged in support of a demurrer to the cause of action. If it were not so, it would be practically impossible for proof to be made in any case of a violation of the law. There are approximately 2,000,000 cars in use by railroads in this country, and if the contention referred to is sound, it would be necessary, in order to sustain a cause of action in cases under this act, that proof be made that the appliance was in a condition of

unrepair at one time, that it continued to be in that condition of unrepair or in a developing condition of greater unrepair up to another time, the lapse of the intervening time being so great as to show a want of ordinary care on the part of the railroad company. In the meantime the very thing to prevent which the law was passed might occur, to-wit, the injury of an employee. The practical administration of justice would be denied and the real enforcement of the law be impossible if the construction contended for was sound.

But it has been held in several cases that even as a defense on the merits no degree of care, no absence of negligence, can excuse for the failure to perform a duty unqualifiedly imposed by statute. And in the recent case of *Railway Company v. Taylor, Admx.*, decided May 18 of the present year by the Supreme Court, the court very pointedly lays the unqualified responsibility upon the railroad for such a condition of unrepair.

As to the third objection. What shall we do in the case of a car which is regularly used in the movement of interstate traffic but at the time when the defect is known to exist is itself not being used for carrying interstate commerce, but is being hauled in a train containing a car loaded with interstate commerce? What is the purpose of the law? Here is a train which is engaged—at least part of it—in interstate commerce, and so long as that is true every car in the train is impressed, so far as the requirements of this act are concerned, with an interstate character. It is a part of the current. The interstate car can not move except with relation to the empty car. The empty car may at any moment be coupled to the interstate car. A brakeman engaged in performing some duty in respect to the interstate car may be compelled to pass over or use a grabiron on the empty car or couple the empty car to the interstate car. Endless confusion would arise if any distinction was made under such conditions between a car loaded with interstate traffic and an empty car regularly used in the movement of interstate traffic, but at the time unloaded and coupled to another

car actually in use in the movement of interstate traffic. Of course the same thing must be said of the loaded car, whatever the character of the freight it carried, if it is a car regularly used in the movement of interstate traffic.

It seems to me that from every point of view the objections raised to the several causes of action are not well grounded. The demurrer is overruled.

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U. S. v. ATCHISON, TOPEKA & SANTA FE RAILWAY  
COMPANY.

(In the District Court of the United States for the Fourth District of  
Arizona.)

*Decided July 17, 1908.*

(Syllabus by the court.)

1. The height of drawbars of freight cars as required by the Federal Safety Appliance Act shall not be more than  $34\frac{1}{2}$  inches nor less than  $31\frac{1}{2}$  inches, from the top of the rail, the rail being on the same level as the cars equipped with such drawbars.
2. In prosecutions to recover the penalty under said act the burden is on the Government to show by a clear preponderance of evidence the facts as alleged in the petition.
3. A failure on the part of the inspectors for the railroad company to discover defects in the equipment of cars cannot excuse the company from liability under the statute.
4. The inspectors for the Government are not required to notify the employes of the railroad company of defects on cars.
5. Nothing but inability on the part of the common carrier to comply with the requirements of the Safety Appliance statute will excuse its non-compliance. The question as to whether it is convenient for a repair to be made at a certain place does not arise.
6. If a drawbar of a car be pulled out en route it is the duty of the carrier to make the necessary repairs at the nearest point where such repair can be made, and the hauling of such car in such defective condition beyond this point is a violation of the law.
7. If for any cause a part of the coupling or uncoupling mechanism of a car be removed, broken, or parts being present and not connected,



thereby rendering it such that it can not be operated without the necessity of a man going between the ends of the cars, then such car is not equipped in compliance with the law.

8. The law requires that both ends of each car be equipped as required by the statute.
9. The statute applies to empty cars as well as to loaded cars.
10. In a prosecution to recover the penalty for the violation of the statute within a Territory of the United States, it is not necessary to show that the defendant is engaged in interstate commerce; neither is it necessary to show that the car itself is engaged in interstate traffic.
11. To constitute a compliance with the law it is not sufficient that the coupling or uncoupling apparatus may be operated with great effort without going between the ends of the cars, but it must be in such condition that it can be operated by the use of reasonable effort.
12. Positive testimony is to be preferred to negative testimony in the absence of other testimony or evidence corroborating the one or the other.

*Joseph L. B. Alexander*, United States attorney; *Roscoe F. Walter*, special assistant United States attorney. for the United States.

*Paul Burkes* for defendant.

#### INSTRUCTIONS TO JURY.

*SLOAN, District Judge* (charging jury) :

This suit is brought under the provisions of the Congressional act of March 2, 1893, as amended by the law of 1896 and by the law of 1903, which act and the said amendments are known as the Safety Appliance acts. Under section 2 of the act it is made the duty of common carriers engaged in interstate commerce, and also common carriers within the Territories of Arizona and New Mexico, to equip their cars with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars. The act also provides that it shall be unlawful for any such common carrier to use any freight car equipped with a drawbar which, measuring perpendicularly

from the level of the tops of the rails to the center of such drawbar, shall not be more than  $34\frac{1}{2}$  inches in height or less than  $31\frac{1}{2}$  inches in height; it being assumed in such measurement that the rails are on the same level as the car equipped with such drawbar.

It is further provided that any violation of either of the provisions of the statute which I have called your attention to renders such common carrier liable to a penalty of \$100 for each and every such violation, to be recovered in a suit or suits brought by the United States in a court having jurisdiction under the act.

The complaint in this case contains fifteen distinct counts or causes of action. The first and the tenth counts relate to alleged violations by defendant of the provision of law with reference to the height of drawbars, it being alleged in each of these counts that the defendant company used a freight car with a drawbar which was less than  $31\frac{1}{2}$  inches in height, measured perpendicularly from the level of the tops of the rails to the center of such drawbar. Counts 2 to 9, inclusive, and 11 to 15, both inclusive, relate to alleged defects in the couplers with which the various cars named in the counts were equipped, it being charged that each was defective in that it could not be operated so as to uncouple the car to which it was attached without the necessity of a man or men going between the ends of such car and that to which it might be coupled.

The burden is upon the plaintiff in this cause to show by a clear preponderance of the evidence that the defects in safety appliances alleged to have existed as set out in the complaint did actually exist and the existence of such defects must be established by a fair preponderance of the evidence.

The burden is laid upon the defendant, under the statute, to discover defects in the appliances mentioned under the act, whenever an opportunity is fairly presented for the discovery of such defects. Any failure or omission on the part of the inspectors of the company to discover such defects,

after such opportunity is presented, can not excuse the company from liability under the statute.

The inspectors for the Government are not required to notify the employes of the railroad company of existing defects previous to or at the time of movement of defective cars, though such inspectors previously discovered such defects.

I charge you that the law requires a strict compliance on the part of common carriers with the provisions of the Safety Appliance act to which I have called your attention. Nothing but inability on the part of a common carrier to comply with the requirements of the act will excuse its non-compliance.

I charge you further that in the case of a car which may have its drawbar pulled out en route, it is the duty of the common carrier to make the necessary repair at the nearest point where such repair can be made. It may haul such car to such nearest point and no farther, using such care and caution as may be needed to insure the highest degree of safety and security while being so hauled. The common carrier may not choose its place to make such repair, but must avail itself, for that purpose, of the nearest point where, by the exercise of diligence and foresight, the company may prepare to make such repair. Inasmuch as inability alone will excuse the common carrier from a literal compliance with the act, it is the duty of the common carrier to have the material and facilities on hand at each repair point which may be needed to make repairs of the kind necessary to comply with the requirements of the Safety Appliance acts. It is the duty of the common carrier to use reasonable foresight in providing material and facilities for such purpose. In such a case it is not a matter of convenience merely, but a question of ability on the part of the common carrier to comply with the act.

In this case the jury is instructed that the defendant company can not excuse, under the Safety Appliance act, the hauling of a car which was without its drawbar from Winslow

to some other point for repairs if it could have been within the power of the defendant company, had it exercised reasonable care and foresight, to have repaired it at Winslow, it being charged, as I have said before, with the duty of having on hand at said repair point the material and facilities needed for that purpose.

It is a violation of law rendering the common carrier liable under the statute to use a car with the clevis pin of the chain connecting the lock block to the uncoupling lever broken or removed for any cause, when the effect would be to render the uncoupling mechanism inoperative without the necessity of a man going between the ends of the cars.

If it appear that the coupler be present but the parts are not so connected that the coupler can be operated without the necessity of a man or men going between the ends of the cars, then it is not a compliance with the statute.

You are also instructed that it is not sufficient that one end of each car be equipped as required by the statute, but both ends must be so equipped that the coupling or uncoupling mechanism of each car may be operative in itself without requiring the manipulation of the device on the adjacent car to effect a coupling or uncoupling to or from such adjacent car.

It is not necessary that any car in question be a loaded car to come within the meaning of the statute. If the car is hauled in the defective condition, the statute is violated regardless of the fact whether the car be loaded or unloaded. Neither is it necessary, in the case of a prosecution to recover the penalty for a violation that occurs within this Territory, that the car be engaged in interstate traffic. It is sufficient under section 1 of the amendment of 1903, if the defective car be hauled by a common carrier within the Territory, even though the carrier be not engaged in interstate commerce, provided the car does not come within the exceptions embraced in section 6 of the original act as amended April 1, 1896, or is not used upon a street railway.

You are instructed that if the Government has clearly and satisfactorily shown by the evidence that the car, as alleged in the first count of the Government's petition, was equipped with a drawbar which, measured perpendicularly from the level of the tops of the rails to the center of such drawbar, was less than 31½ inches in height, as required by section 5 of the Federal Safety Appliance act, approved March 2, 1893, as amended April 1, 1896 and March 2, 1903, then you will find the defendant guilty on such count. And so it is with reference to count 10 of the Government's petition.

You are also instructed that if the Government has clearly and satisfactorily shown by the evidence that the car, as alleged in count 2 of the Government's petition, was not equipped with couplers coupling automatically by impact and which could be uncoupled without the necessity of a man or men going between the ends of the cars, then you will find the defendant guilty on that count. And the same with respect to counts 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, and 15 of the Government's petition.

On the other hand, if you fail to find clearly and satisfactorily from the evidence that as to any of these counts there was a violation of the requirements of the statute, then as to such count or counts you will find the defendant not guilty.

The court instructs you that if you find from the evidence that the absence of the "keeper" did not destroy the automatic action of the coupler on cars AT96348, 96294, and 96260, as set out in the fifth, sixth, and seventh counts respectively of plaintiff's complaint, but that such couplers could by the use of reasonable effort have been uncoupled by use of the lever of their own mechanism without the necessity of a man going between the cars, notwithstanding the absence of the "keeper," then you must find for the defendant on the fifth, sixth, and seventh counts.

In considering the testimony of the witnesses who have testified before you, you have a right to weigh, in making up

your judgment, the testimony of any witness, but in doing this you will not give either more or less weight to the testimony of any witness because of the fact that such witness testifies on behalf of the Government or because of the fact that such witness testifies on behalf of the railroad company. But you will give to the testimony of each witness that weight which, in your judgment, it is entitled to from all the facts and circumstances in the case.

In this connection it is proper to state that positive testimony is to be preferred to negative testimony, other things being equal; that is to say, when a credible witness testifies to having observed a fact at a particular time and place and another equally credible witness testifies to having failed to observe the same fact with the same or equal opportunity to so observe such fact, the positive declaration is to be preferred to the negative in the absence of other testimony or evidence corroborating the one or the other.

You are instructed that if you believe, from a consideration of all of the testimony in the case, that any witness has willfully testified falsely as to any material fact, then you are at liberty to disregard the whole of his testimony, except in so far as the testimony of such witness may be corroborated by other credible evidence in the case.

The court instructs you that by a preponderance of the evidence is not meant the testimony of the greater number of witnesses, but rather the greater weight of credible testimony as determined by the character of the testimony of the various witnesses and the respective means and opportunities such witnesses may have had of acquiring information and knowledge and of seeing or knowing and remembering that to which they testify, the probability of its truth, their interest, if any, whether as parties or witnesses in the result of the action, and also their manner of testifying, and every other fact which will enable you to determine the weight and credibility to be given to their testimony.

If you find the defendant guilty, you will say: "We, the

jury, find the defendant guilty on the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth counts of the petition."

You may find the defendant guilty on some of the counts and not guilty on the others. In that case the form of your verdict will be: "We, the jury, find the defendant guilty" on whatever number of counts you do find the defendant guilty, and "not guilty" on whatever you find the defendant not guilty.

If you find the defendant not guilty, you will say: "We, the jury, find the defendant not guilty."

Verdict of guilty on all counts.

United States Circuit Court of Appeals, Seventh Circuit.  
No. 1475.—October term, A. D. 1908.

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**BELT RAILWAY COMPANY OF CHICAGO, PLAINTIFF IN ERROR, *v.* UNITED STATES OF AMERICA, DEFENDANT IN ERROR.**

In error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

*Decided February 3, 1909.*

A belt-line railway company, operating a line lying wholly within a city, county, or State, while moving a commodity originating at a point in one State and destined to a point in another State, is engaged in interstate commerce by railroad, and as such is within the Federal Safety Appliance Acts.

*William J. Henley, William L. Reed, and Francis Adams, Jr., for plaintiff in error.*

*Edwin W. Sims, United States attorney; Harry A. Parkin, assistant United States attorney; and Philip J. Doherty and*

*Luther M. Walter*, special assistant United States attorneys,  
for defendant in error.

Before GROSSCUP, BAKER and SEAMAN, Circuit Judges:

OPINION OF THE COURT.

BAKER, *Circuit Judge*, delivered the opinion of the court:

The writ is addressed to a judgment assessing a penalty against plaintiff in error for an alleged violation of the provisions of the Safety Appliance acts in relation to power brakes. 27 Stat. L. 531, 29 Stat. L. 85, 32 Stat. L. 943. Certain questions relating to the purpose, scope, and validity of this legislation are considered in *Wabash R. Co. v. U. S.* and *Elgin, etc., R. Co. v. U. S.*, herewith decided.

The only assignments presented and discussed by plaintiff in error are that the court erred in refusing to direct a verdict of not guilty, and in giving the following instruction: "The question therefore presents itself, and it is a legal question, Was the Belt Company, at the time it moved this string of 42 freight cars, containing a car originating in Illinois and destined to Wisconsin, engaged in interstate commerce? I charge you that when a commodity originating at a point in one State and destined to a point in another State is put aboard a car, and that car begins to move, interstate commerce has begun, and that interstate commerce it continues to be until it reaches its destination. If, between the point of origin of this commodity and the point of destination of this commodity, the car in which it is being vehicled from origin to destination passes over a line of track wholly within a city, within a county, or within a State, the railway company operating that line of track while moving this commodity, so originating and destined from one point to another point, intrastate, is engaged in interstate commerce."

Was there sufficient evidence to warrant the jury in finding



that in hauling the train in question plaintiff in error as a common carrier was "engaged in interstate commerce by railroad?"

The railroad tracks of plaintiff in error lie wholly within Cook County, Ill. There are 21 miles of main line and about 90 miles of switching and transfer tracks. The main line constitutes a belt that intersects the trunk lines leading into Chicago. By leads and Ys direct physical connection with the trunk lines is maintained. Plaintiff in error's business consists in transporting cars between industries located along its line, between industries and trunk lines, and between trunk lines. The first two kinds need not be noticed as the transportation here involved was between trunk lines. The train in question contained among others a car laden with lumber, and consigned from a point in Illinois on the Chicago & Eastern Illinois to a point in Wisconsin on the Chicago & Northwestern. This car was taken by the plaintiff in error from the tracks of the Eastern Illinois over the belt line and put on the tracks of the Northwestern. For services of this kind plaintiff in error makes arbitrary charges of so much a car, which are collected monthly from the railroad companies for which the services are rendered. In such operations plaintiff in error has no dealings with the shippers and pays no attention to the class of traffic. Its relation to the traffic was stated by the general superintendent, as follows: "The Belt Company acts practically as an agent for the trunk lines in the handling of cars from one connection to another through its yards."

In *United States v. Geddes*, 131 Fed. Rep., 452, defendant as receiver was operating a narrow gauge railroad that lay wholly in Ohio. "At Bellaire it connected with the Baltimore & Ohio road, in the sense that it received from the Baltimore & Ohio freight from other States marked for points on its line, and delivered to the Baltimore & Ohio freight from points on its line marked for other States, in the following manner: There was no interchange or common use of cars,

the gauges of the two roads being different. The cars of the defendant road were used only on its own line. But a transfer track ran from the main line of the Baltimore & Ohio to the terminal station of the defendant road, so that the freight cars of the two roads could be placed alongside adjoining platforms and the transfer of freight made by the use of trucks handled by the Baltimore & Ohio men. No through bills of lading for such freight were issued by either road, no through rate was fixed by mutual arrangement, and no conventional division of a through freight charge was made." The Circuit Court of Appeals for the Sixth Circuit decided that the narrow gauge cars in question were not subject to the Safety Appliance act, holding that a common carrier was not "engaged in interstate commerce by railroad" within the meaning of the Safety Appliance act unless, referring to the definition in the original interstate commerce act, it was "engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used, under a common control, management, or arrangement for a continuous carriage or shipment," from one State to another. The equipment of a narrow gauge railroad which lay wholly in Colorado and which was similarly endeavoring to conduct a separate and independent business, was held by the Circuit Court of Appeals for the Eighth Circuit to be within the Safety Appliance act. *U. S. v. Colorado, etc., R. Co.*, 157 Fed. Rep., 321.

Plaintiff in error argues the present case as if the judgment could not properly be affirmed without our adopting the decision in the eighth circuit as against that in the sixth. In our judgment the question presented to those courts is excluded from our consideration by certain distinguishing and controlling facts. The narrow gauge track had no direct physical connection with the broad gauge tracks of the interstate trunk lines, and so no cars from other States, laden with goods from other States, were hauled on the local highway. The Belt Line physically connected its track with those of the

Eastern Illinois and of the Northwestern, so that a continuous highway across State lines was formed, on which interstate traffic, loaded on interstate cars, was moved from origin to destination without change of cars. The narrow gauge road, by limiting its bills of lading to points on its own line, endeavored to escape being held a common carrier engaged in interstate transportation. The Belt Line, issuing no bills of lading because of having no dealings with the shipper or with anyone on his behalf, performing its gateway service on account of and as agent of the trunk lines, made its track the track of its principals. Consequently the character of the transportation should be determined by considering the transportation as the act of such principals. Trunk-line yards are in some instances so related to each other that through cars can be transferred without the intervention of a go-between. We are of opinion that the transportation in question was the same in legal effect as if the Eastern Illinois by means of its own locomotive and track had put the through car on the Northwestern's track. In this view there was evidence from which the inference of fact might warrantably be drawn by the jury that there was a common arrangement for a continuous carriage over the Eastern Illinois and the Northwestern; and so, with respect to the movement in question, plaintiff in error was engaged in interstate transportation.

When the portion of the charge complained of is read in the light of the undisputed facts, we see no basis for saying that the substantial rights of plaintiff in error were injuriously affected.

The judgment is affirmed.

*SEAMAN, Circuit Judge, dissenting:*

I can not concur in the affirmance of this judgment, as I believe the operation of the Belt Company described in the record is not within the meaning of the Safety Appliance act. It clearly appears that this company was an independent railroad within the city, engaged only in transferring cars

(loaded or unloaded) from the terminal of one trunk line in Chicago to that of another trunk line; that it had no part in the shipment of any commodities which were upon the cars, nor interest in shipping bills or rates charged, nor concern in their ultimate destination and delivery to consignee; that its only service involved herein was the transfer of cars over its own lines, from one terminal to the other in Chicago, when the cars were delivered to it by a trunk line to be so transferred, for which service the Belt Company was paid by the trunk line an arbitrary rate per car, on monthly collections. In such service the Belt Company is neither chargeable with notice whether the service of the trunk lines in respect of the cars is interstate commerce or otherwise, nor concerned in such inquiry, as I believe. It was not "engaged in interstate commerce," as defined in the interstate commerce act, and I am of opinion that the two acts are in *pari materia*, so that the terms of the Safety Appliance act are inapplicable to the service thus performed by the Belt Company, and the judgment should be reversed.

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THE UNITED STATES *v.* LEHIGH VALLEY RAIL-  
ROAD COMPANY.

(Motion for new trial reported at 162 Fed. Rep. 410.)

In the District Court of the United States for the Eastern District of  
Pennsylvania.

December Term, 1906.

(Decided March 17, 1908.)

1. An action brought to recover the penalty provided for in the Safety Appliance Act is not a criminal case.
2. The Government need not prove its case beyond a reasonable doubt; it is sufficient if it furnishes clear and satisfactory evidence of all the necessary facts.

The statute requires as to couplers that the apparatus on each end of every car shall be in operative condition.

In order to constitute a violation of the Safety Appliance Act, the car must be moved in a defective condition.

Where a car, which had been at rest at a station for a period of time, is taken out upon the road in a defective condition, the carrier is liable for the penalty, and it is wholly immaterial whether the defendant knew of the defect or could have ascertained its condition by the exercise of reasonable care; in such a case the carrier must find the defect at its peril.

#### STATEMENT OF FACTS.

This is an action brought by the United States to recover the statutory penalty of \$100 under the Safety Appliance act.

Two inspectors of the Interstate Commerce Commission found Philadelphia & Reading car No. 46247, November 12, 1906, at Allentown, Pa., in the yard known as the East Penn Junction yard, with the lever disconnected from the lock pin or lock block on each end of the car. The car was first inspected at 2:50 p. m.; it left East Penn Junction at 8:30 p. m. for Cementon, Pa., a few miles away, and was found there the next day in the same defective condition. Defendant's employes testified that a defect had existed at East Penn Junction on the 12th, but defendant contended that, as the repairs were generally made when found, the car did not leave for Cementon in a defective condition.

*J. Whitaker Thompson*, United States attorney; *John C. Swartley*, assistant United States attorney; *Luther M. Walter*, special assistant United States attorney, for plaintiff.

*J. Wilson Bayard, Esq.*, for the defendant.

Hon. JOHN B. McPHERSON, *Judge* (charging jury):

Gentlemen of the jury: The question that has been submitted to you, the question of fact that has been argued to you, is one that has not appeared in the other cases that perhaps may have been tried in the hearing of some of you. The defendant contends here that the Government has not offered

sufficient evidence to satisfy you that this car was hauled in a defective condition from East Penn Junction to Cementon, to which the load which it carried was bound, and that is the question of fact for you to determine in this case. This Safety Appliance act, the particular section with which we are concerned, makes it unlawful for a common carrier, such as the Lehigh Valley Railroad Company, to haul or permit to be hauled or used on its line any car used in moving interstate traffic not properly equipped with automatic couplers. In this case the question is whether or not this car was moved from East Penn Junction to Cementon by the Lehigh Valley Railroad Company in a condition that was not such as is provided for by this statute, and the duty is upon the Government to satisfy you upon that subject. The burden of proof rests upon the Government in this case to establish to you by clear and satisfactory testimony that that fact existed. It is not a criminal case. We are not trying an indictment. We are trying a suit for a penalty, a suit for a penalty of \$100, for an alleged non-compliance with this Safety Appliance act, and the burden of proof rests upon the Government to make out its case by clear and satisfactory testimony. I repeat, the burden of proof is upon it, and the burden continues to be upon it throughout the case. It is not required to furnish evidence beyond a reasonable doubt, but it is required to furnish clear and satisfactory evidence of all the facts necessary to make out its case. The act requires couplers at both ends of the car that shall couple automatically by impact, and couplers that may be uncoupled without the necessity of going between the cars; this requires that there shall be levers, either a lever going entirely across the end of the car, or a lever upon one side, which operates the mechanism of the coupler so that it may be separated from the other car without the necessity of anybody going between. And it is necessary, to comply with the statute, that the coupler at each end of the car shall be in operative condition. That duty is imposed upon any carrier using a car that is engaged in interstate traffic.

That particular point of time to which your attention is

directed is the 12th day of November, 1906, and the particular place is East Penn Junction in this State, and from there to Cementon, a few miles away, and the charge is that a particular car was defectively equipped. That it was defectively equipped seems to be conceded, as I understand, by the defendant in this case; that is, that one or both couplers were out of order. Testimony has been given by the defendant's witnesses to that effect, as I understand it, but the averment of the defendant is that that defect was remedied and that there is no evidence from which the jury may properly infer that the car was actually moved in a defective condition. It is necessary that the Government shall establish, as I have said to you, by clear and satisfactory evidence that the car was so moved, because it is quite clear that so long as a car, no matter how defectively equipped it may be, remains at rest, it does no harm and can not do any harm, and does not offend against the statute. It is when it is actually in motion and therefore capable of doing harm to the operatives upon the train that the act applies, and therefore it is necessary, and it is the vital question of fact in the case, to establish as to whether or not while this car was being moved it was in a defective condition. Therefore I submit those questions of fact to you for your determination. Did the Lehigh Valley Railroad transport or haul this car from East Penn Junction to Cementon, and if they did, during that period was it defectively equipped?

I have not heard any argument made to you with regard to the question of reasonable care and diligence. The question is, however, raised by one of the points that is presented to me by the defendant, and therefore I say to you in a word that the question of reasonable care and diligence that may have been exercised by the defendant is not a matter for your consideration. As I understand this statute, the railroad company is bound to discover defects if they exist, under the circumstances as they have been offered to us upon this trial. I am not dealing with anything except the facts that are now before us. Here is a case in which this car has been shown to

have been at rest at East Penn Junction for a number of hours, and therefore when there was an opportunity to inspect upon the part of the railroad company. Now, under such circumstances, my reading of the statute is that it imposes upon the company the duty to find the defects if defects exist, and that it must find them at its peril. If its inspectors failed to find them, then the liability for the penalty exists if the car is afterwards moved without having the defects repaired. That, as I understand, is the case for your determination. If you are not satisfied from all the evidence in the case that the Government has by clear and satisfactory evidence made out that this car was hauled in a defective condition between East Penn Junction and Cementon, then you ought to find in favor of the defendant. If they have satisfied you that this car was so defective at the time when it left East Penn Junction that it could not be automatically coupled and could not be uncoupled without the necessity of somebody going between the cars to perform that operation, then your verdict ought to be in favor of the United States for the sum of \$100.

Verdict for the Government.

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THE UNITED STATES *v.* PHILADELPHIA AND  
READING RAILWAY COMPANY.

(Motion for new trial, reported at 162 Fed. Rep. 405.)

In the District Court of the United States for the Eastern District of  
Pennsylvania.

December Term, 1906.

*Decided March 17, 1908.*

1. An action brought to recover the penalty provided for in the Safety Appliance Act is not a criminal case.
2. The Government need not prove its case beyond a reasonable doubt; it is sufficient if it furnishes clear and satisfactory evidence of all the necessary facts.



3. The statute requires as to couplers that the apparatus on each end of every car shall be in operative condition.
4. In order to constitute a violation of the Safety Appliance Act, the car must be moved in a defective condition.
5. Where a car, which had been at rest at a station for a period of time, is taken out upon the road in a defective condition, the carrier is liable for the penalty, and it is wholly immaterial whether the defendant knew of the defect or could have ascertained its condition by the exercise of reasonable care; in such a case the carrier must find the defect at its peril.

#### STATEMENT OF FACTS.

This was an action brought by the United States to recover three penalties of \$100 each alleged to have been incurred by the defendant in hauling on November 12, 1906, Lehigh Valley car No. 83759, November 13, 1906, Lehigh Valley car No. 69609, and on September 26, 1906, its own No. 49786, from Allentown, Pa., with the coupling and uncoupling apparatus on one end of each car in a defective condition, in that the lock pin or lock block was disconnected from the uncoupling lever. Two Government inspectors of safety appliances found these cars in the defendant's yard at Allentown and after at least half an hour's interval the defendant hauled the cars in the defective condition. The defendant offered evidence that in the ordinary course of its business it had inspectors whose duty it was to inspect cars moved by it and if any defects were found such defects were noted in an inspection book kept for that purpose; that it had examined these books and found no entry of any defect having been found or repaired.

J. WHITAKER THOMPSON, *United States attorney*; JOHN C. SWARTLEY, *assistant United States attorney*; LUTHER M. WALTER, *special assistant United States attorney* for plaintiff.

JAMES F. CAMPBELL, ESQ., for defendant.

HON. JOHN B. MCPHERSON, *Judge* (charging jury):

Gentlemen of the jury: This is an action brought by the United States, as no doubt you understand, to recover the

sum of \$300, being a penalty of \$100 for the use by the defendant company of each of three cars, which it is said were defectively equipped in violation of the act of Congress which is ordinarily known as the Safety Appliance Act. There is only one portion of it to which your attention need be directed, and that is the second section of the act, which provides, in substance, that no common carrier may haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars. The meaning of that section is clear enough. The direction of Congress is, that any common carrier, such as a railroad, must equip its cars so that there shall be at both ends a coupler which will couple automatically by impact when it comes in contact with another car, and which may be uncoupled also from the side without the necessity of a man going between the ends of the two cars in order to perform that operation. That requires that each car taken separately shall be complete, completely equipped; that is to say, it requires that the couplers at both ends shall be in good order.

It is not sufficient, under this act of Congress, that one coupler should be in good order and the other should be defective, although it appears from the testimony in the case that under certain circumstances even if one of the couplers is defective the process of coupling may nevertheless take place, provided the coupler upon the car with which the defective car comes in contact is in good order. If the two ends that come together were both out of order, then the coupling could not take place automatically, but if one of them is in good order while the other is not, then, under certain circumstances, the coupling may take place automatically just the same as though both cars were thoroughly equipped. But, however that may be, the act of Congress does not permit such a situation to exist. It requires that each car taken by itself shall have the couplers at both ends in good

order, so that at each end the coupler may perform its service in the manner directed by this statute—that is to say, automatically by the impact of the two cars. And it also requires that the couplers shall be in such order that the cars may be uncoupled without the necessity of somebody going between the cars; that is done by the use of levers. In some instances the lever comes entirely across the ends of the car, so that at whichever side the brakeman or employee happens to be standing he may perform whatever operation is necessary for the purpose of uncoupling. On some of the cars, perhaps the most of them, as the testimony would seem to indicate, I believe it is only upon one side, and then, of course, they can only be used from that side, but nevertheless they can be so used. That is the provision of the statute.

Of course, you will see at once—perhaps you have seen already, if you have been thinking at all about the case—that some difficult questions might arise as to when common carriers might be liable, and it is very easy to conceive of situations in which it would be hard to hold them liable under the strict letter of the law. For example, suppose a car started from the point of shipment in perfectly good order, and then through no fault of the carrier something happened to the coupler while the journey was in progress. Of course, under the strict letter of the law every minute the car was in use after that time there would be a violation of the law; but, I say, that would present a hard case, and if the carrier, under the proper construction of this statute, is liable under such circumstances, of course, there is a certain hardship about the situation. But we have nothing to do with a case of that kind. That may safely be left to be dealt with when the time comes. I give you that as an illustration, and others might be easily thought of. We are dealing with the particular situation disclosed by the evidence, and the jury must confine itself to that, as I intend to do in what I have to say to you.

Here is a case where a certain number of cars, constituting

a train used in interstate traffic—and about that matter there is no controversy—are at rest for a certain length of time; in all cases for more than an hour, in some cases for, I think, several hours; but, at all events, in all of these three cases at rest for more than an hour, and therefore affording an opportunity for inspection for the discovery of defects in these automatic couplers. In a case like that I instruct you that it is the carrier's duty to find any defects that may exist, and if the carrier fails to find them, then the carrier is liable for the penalty imposed by the statute; because if the train is used afterwards with the coupler out of order, then, of course, under the precise letter of the statute, the carrier is using a coupler that can not be coupled automatically by impact or can not be uncoupled without somebody going between the cars, or perhaps neither operation can be performed as the statute contemplates. In other words, the question of diligence or carefulness on the part of the carrier in inspecting the cars has nothing at all to do with the matter now before you. The obligation is laid upon the carrier by the statute to find, in effect, any defect that may exist, when it has, as it had under these circumstances, the opportunity to discover it; and if its inspectors do not discover it, then the carrier is liable for those defects and for the penalty that is imposed for the use of the car having such defects.

That leaves, therefore, for your consideration, in each of these three cases the question of fact whether these cars, or either of them, were defective. You have heard the two inspectors in the service of the Interstate Commerce Commission upon that point, and there is other testimony offered by the defendant carrier which would tend to show that they were mistaken, and you will have to determine what is the fact. They may, perhaps, have mistaken some other car for the one that is spoken of here, or they may not have discovered the things that they said they did discover; instead of the couplers being out of order, they may

have been in order; and those are questions of fact which I submit to the jury for their determination.

There are three separate charges here, and it is in the power of the jury, as they may find the evidence to indicate, to find either that the carrier should pay a penalty of \$300 or of \$200 or of \$100, or that it should pay nothing, according as they may find that one or more of these cars were defective or as they may find that they were all in the order contemplated by the statute.

There is this further to be said: This is what is called a penal statute; that is to say, it is a statute that imposes a penalty. It is not a statute that makes a criminal prosecution or requires a criminal prosecution, or permits, indeed, a criminal prosecution for the violation of its provisions, but it imposes a money penalty. The rules that apply, therefore, in the criminal court do not apply here. It is not necessary that the United States should prove its case beyond reasonable doubt. As you very well understand, that is the measure of proof that is required in a criminal case. It does not apply here. The United States has the burden of proof upon it in order to make out its case. It has the burden of proof from the beginning to the end of it. It never shifts. It is bound to make out its case, and it is bound to make it out by evidence that is clear and satisfactory to the jury. That is the obligation that is laid upon it. Not by evidence which is of that high degree which we describe when we say evidence beyond reasonable doubt, but it is bound to make it out by such evidence as is clear and satisfactory, and by that degree of proof to make out all the elements which go to constitute the charge. If the United States has failed to come up to that standard, then it has failed in this case as to one or more or all of these particular charges, because that obligation rests upon it.

That, I believe, constitutes all the instructions that I need give you with regard to this case. They cover, so far as I can see, all the points upon which I have been asked

to give you specific instructions, and I therefore need not confuse you by reading them over and answering them specially.

The jury rendered a verdict in favor of the United States for \$300.

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UNITED STATES *v.* PENNSYLVANIA RAILROAD  
COMPANY.

(Motion for new trial, reported at 162 Fed. Rep. 408.)

(In the District Court of the United States for the Eastern District of  
Pennsylvania.)

December Term, 1906.

*Decided March 18, 1908.*

1. An action brought to recover the penalty provided for in the Safety Appliance Act is not a criminal case.
2. The Government need not prove its case beyond a reasonable doubt; it is sufficient if it furnishes clear and satisfactory evidence of all the necessary facts.
3. The statute requires as to couplers that the apparatus on each end of every car shall be in operative condition.
4. In order to constitute a violation of the Safety Appliance Act, the car must be moved in a defective condition.
5. Where a car, which had been at rest at a station for a period of time, is taken out upon the road in a defective condition, the carrier is liable for the penalty, and it is wholly immaterial whether the defendant knew of the defect or could have ascertained its condition by the exercise of reasonable care; in such a case the carrier must find the defect at its peril.

STATEMENT OF FACTS.

This is an action brought by the United States to recover a penalty of \$100 on account of an alleged violation of the safety-appliance act.

Inspectors of the Interstate Commerce Commission testified that defendant hauled Boston & Albany car No. 12485 from West Philadelphia when the lock set was dis-

connected from the lock block on one end of the car and hung loose on the lift chain. All the parts were present, but were not coupled together, so that the lever was inoperative and the car could not be uncoupled without a man going between the cars for that purpose. The defendant offered evidence that it had inspectors whose duty it was to examine and repair defects; that when defects were found an entry was made in the inspectors' book; that as to this particular car no entry of repairs or defects had been made.

J. WHITAKER THOMPSON, *United States attorney*; JOHN C. SWARTLEY, *assistant United States attorney*; LUTHER M. WALTER, *special assistant United States attorney*, for the plaintiff.

JOHN HAMPTON BARNES, ESQ., for the defendant.

McPHERSON, *Judge*, (charging jury).

Gentlemen of the jury: Some of you, perhaps all of you, have already taken part in similar trials, but, at all events, you have listened to them, and it is almost superfluous for me to go over what I have already said two or three times. Nevertheless, I will say very briefly what ought to be said with reference to the present case.

There is just one charge here against the Pennsylvania Railroad. It is charged with having out of order one safety appliance upon a car in its possession. It was not one of its own cars; it was a car belonging to the Boston & Albany Railroad; nevertheless, that makes no difference. As you know, railroads are continually interchanging cars; and the act of Congress makes no difference between cars that are owned by a railroad and cars that come upon its system and are hauled by it over its rails. If a car is not in proper operative condition, it is the duty of the railroad to refuse to receive it, as it has a perfect right to do. After receiving it, it is just as much

bound by its condition as if it were its own own car from the beginning. The question of fact here for your determination, about which there is conflicting evidence, is the condition of this car, whether or not it was out of order, whether or not it was out of operative condition, and that is a question of fact that you must resolve. If the car was in order, if the car was in such a condition that it complied with the statute, of course, there has been no offense committed. The second section of this act under consideration requires that the cars shall be so fitted with safety appliances that when the two cars come together there shall be an automatic coupling, by the mere fact of their coming together, the impact of their coming together, the coupling shall be done automatically, and it also requires that there shall be a device by which uncoupling may be performed without the necessity of sending a man between the cars to perform that operation or to assist in it. That is done necessarily through the use of a lever, sometimes of a lever that runs across the entire end, and sometimes of a lever that runs only halfway across, and is as has been testified to you, always upon the left-hand side of the car as one faces it. Either lever complies with the provision of the statute.

Therefore, was this car in that condition? You have heard the testimony of the witnesses upon the stand, the two inspectors who are in the service of the Interstate Commerce Commission, and have testified to you what they say they found. You have heard the testimony of the other witnesses with regard to inspection, such inspection as was made by the Pennsylvania Railroad Company, and from the testimony from both sides, taken together, you must determine whether this car was in operative condition as required by the statute. I have just explained to you what is required. If it was in that condition, then, as a matter of course, the defendant has not committed any offense for which a penalty could be imposed. It is necessary that both



ends of every car should be completely equipped with devices that are in operative condition. It is not enough that one end shall be in good order and the other end not in good order. Both ends, under the statute as I construe it, must be in good working condition. It is the duty of the United States in this suit also to satisfy you by clear and satisfactory evidence that these devices, or one of them, were out of order. The burden of proof is upon the United States, and it rests upon it throughout the course of the trial. It is not bound to show to you beyond reasonable doubt, as would be the case if we were trying an indictment in a criminal case—if this defendant was here on a criminal charge. I say it is not necessary that the measure of proof should rise to that degree, beyond reasonable doubt, but it is necessary, this being an action for a penalty that the United States should take up the burden and carry it, showing by clear and satisfactory evidence that all the elements in this offense were present. If the testimony, therefore, is not of that quality, the United States has failed, and your verdict would have to be for the defendant.

Let me say also that there is no question in the case for your consideration concerning the measure of care or diligence that the defendant may have exercised with regard to inspection. In my construction of the statute, that is not a matter which the act of Congress makes necessary for consideration. As I understand the law, Congress has required a common carrier engaged in interstate commerce to see that these devices are in order under conditions such as are here before us. I am not speaking now of accidents that might happen to them while they were in the course of transportation, when it would be impossible for anybody to know that they were out of order or to repair them, but I am speaking of a condition that may exist while the cars are at rest and when an opportunity is afforded for the process inspection. That was the case here, according to the undisputed evidence. This car and the train of which

it was part lay at the Mantua yards for some hours—I do not know for how long exactly—the precise time is not important, but an opportunity was afforded, at all events, for inspection. That being so, in my construction of the statute, the duty rested upon the carrier to find any defect that existed, and if the defect was there and the carrier failed to find it, it would be liable to the penalty, even although it made an inspection and made it by careful men, who performed their duty according to the best of their ability. The fact that they failed to find it would, while perhaps not a fault in one sense, nevertheless expose the carrier to the penalty. So that the whole case depends upon what you find the question of fact to be. Was this car out of operative condition at the time testified to by the witnesses? I repeat, the burden of proof is on the Government to show you by clear and satisfactory evidence that it was out of order at one or both ends, and if the Government has not so satisfied you, then your verdict must be for the defendant. If, however, it has satisfied you that this was out of order, that one or both ends, of this coupling device were out of order, then your verdict should be in favor of the United States for the sum of \$100.

The jury rendered a verdict in favor of the United States for \$100.

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UNITED STATES *v.* TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS.

(In the District Court of the United States for the Eastern District of Missouri, Eastern Division.)

*Decided June 3, 1908.*

(Syllabus by the court.)

1. An action brought to recover a penalty under the Safety Appliance Act is civil.

2. It makes no difference under the law whether the chains were broken actually in the links or were disconnected; they were in point of fact inoperative, and if the railroad company permitted the cars to be hauled while the couplers were inoperative, then under the statute it is guilty.

The Interstate Commerce Commission lodged with the United States attorney information showing four violations of the safety-appliance law by the Terminal Railroad Association of St. Louis. Defendant made general denial as to all the counts and offered evidence to show that the cars were equipped with automatic couplers, but the chains connecting the lock pins to the uncoupling levers were disconnected and needed only to be connected to make the appliance available.

HENRY W. BLODGETT, *United States attorney*; TRUMAN P. YOUNG, *assistant United States attorney*, and ULYSSES BUTLER, *special assistant United States attorney*, for the United States.

EDWIN W. LEE for defendant.

DAVID P. DYER, *District Judge* (charging jury):

Gentlemen of the jury, this is a proceeding brought by the United States district attorney against the Terminal Railroad Association of St. Louis to recover the sum of \$400. There are four counts in the complaint. It is a civil action, provided by statute for such cases. It is based upon section 2 of an act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes. That act was approved March 2, 1893, and amended by an act of April 1, 1896. The first and second sections of the act are as follows:

That from and after the first day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

Section 2 of the act under which this complaint is made is as follows:

That on and after the first day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Section 6 of the act provided:

That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed.

The fact is conceded that these cars were engaged in interstate traffic. The cars were destined to New York and Philadelphia, received here over some railroad from Kansas City. So there is no question about the cars being engaged in interstate traffic.

Congress has seen proper to enact this statute, made for the purpose of protecting from injury the employees. As to the wisdom of the act you, nor I, have nothing to do. It is the law of the land. It is charged in the first count of this petition (and each of the other counts is the same, with the exception of the cars named in the respective counts) that on or about the 8th day of May, 1907, defendant hauled the said car with said interstate traffic over its line of railroad from St. Louis, within the State of Missouri,

within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "A" end and the "B" end of such car was out of repair and inoperative, the chains connecting the lock pins or lock blocks with the uncoupling levers being broken on said ends of said car.

The main charge here is that the cars were in a condition which made them inoperative under the provisions of this act, and I charge you that it makes no difference whether the chains were broken in fact in the links of the chain or were merely disconnected. It was the duty of the railroad company and its employees to see that those chains were in condition so that they could be used as this act contemplates. They should be in such condition that they could be used without necessitating a man going in between the cars. I fail to find any difference, under the provisions of this act, between a chain that happens to be broken in a link and a chain that is uncoupled and inoperative.

You heard the testimony that was given here yesterday. One witness testified that some of these chains were broken and some were disconnected. Another witness testified that he did not discover the broken chains, but did discover that they were disconnected. The witnesses for the defendant testified that the chains were not broken but were all disconnected. There is no dispute, therefore, that the chains were uncoupled; and it makes no difference under the law whether the chains were broken actually in the links or were disconnected; they were, in point of fact, inoperative, and if the railroad company permitted them to be used while they were inoperative, then under this statute it is guilty.

I therefore charge you that under all the evidence in this case the plaintiff is entitled to recover on each count of its complaint in the sum of \$100, and the court instructs you that under the law and the evidence and the pleading you must return a verdict in favor of the plaintiff in the sum of \$100 on each of the four counts of the complaint.

THE UNITED STATES *v.* ATCHISON, TOPEKA &  
SANTA FE RAILWAY COMPANY.

(In the District Court of the United States for the Southern District  
of California.)

(Syllabus by the court.)

1. The Federal Safety Appliance Act requires carriers subject to the act to find at their peril and repair defects in the safety appliances embraced within the act. If a carrier fails to find and repair such defects it is liable for the statutory penalty.
2. It is incumbent upon the Government to make out its case by clear and satisfactory evidence.

OSCAR LAWLER, *United States attorney*; ALOYSIUS I. McCORMICK, *assistant United States attorney*, and ROSCOE F. WALTER, *special assistant United States attorney*, for plaintiff.

E. W. CAMP, for defendant.

*Decided June 6, 1908.*

WELLBORN, *District Judge* (charging jury):

Gentlemen of the jury: The circumstances of this case do not call for nor admit of any protracted or elaborate statement or explanation of legal principles, and I shall not needlessly consume time, therefore, in preparing written charges. Indeed, I think that the mere reading of the provisions of the safety-appliance act of Congress, on which the Government relies for recovery in this case, will enable you intelligently to perform your duties as jurors and pass upon the facts. I will suggest to you what those duties are, and indicate the correct method of their performance.

The act of Congress in question seems to have been passed in 1893—the amendment. The first section is as follows:

*Be it enacted by the Senate and the House of Representatives—*

I will only read the pertinent portions of the section to you—

*Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled* That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive or engine, in moving interstate traffic, not equipped with a power driving-wheel brake.

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul, or permit to be hauled, or used on its line, any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

SEC. 4. That from and after the first day of July, eighteen hundred and ninety-five, or until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for a railroad company to use any car in interstate commerce that is not provided with grab irons or hand-holds in the ends and sides of such car, for the security of the men in coupling and uncoupling cars.

SEC. 6. That any such common carrier using any locomotive engine running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney of any District Court of the United States having jurisdiction of the locality where such violation shall have been committed. It shall be the duty of said District Attorney to bring suits upon duly verified, etc.

Those provisions that I have read are the pertinent provisions of the law.

There is no controversy that the defendant, at the times mentioned in the complaint, was a common carrier engaged in interstate commerce by railroad, and that the engines and cars mentioned in said complaint were used in hauling and moving interstate traffic, and the only questions for you to determine are whether or not the appliances on the engines and cars mentioned in the complaint were out of order, as alleged in the complaint. Whether or not the defendant inspected said engines and cars, and was diligent and careful in inspecting them, is not a matter you need concern yourselves about. The act requires defects in the appliances to be found at the peril of the company, and if it fails to find them the company is responsible for the penalty. If

the Government has not made out its case by clear and satisfactory evidence your verdict should be for the defendant. If, however, you are satisfied from the evidence that either of said engines or cars was not equipped with the appliances required by the acts of Congress to which I have called your attention, or that such appliances were defective and inoperative, then such engine or car was out of order in that particular respect, and your verdict on the count relating thereto should be for the Government. You can find for the plaintiff or defendant on any one or more or all of the counts, as the evidence seems to you to require.

Verdict for plaintiff.

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UNITED STATES v. THE CINCINNATI, HAMILTON  
& DAYTON RAILROAD COMPANY.

(In the District Court of the United States for the Northern District of Ohio.)

*Decided June 24, 1908.*

(Syllabus by the court.)

The Federal Safety Appliance Law lays an unqualified duty upon a railroad company subject to the act to keep its coupling devices in a certain condition (*Railroad Company v. Taylor, Administratrix*, 210 U. S. 281), and when an employe of such company deliberately puts such devices in another condition, which condition the law undertakes to prevent, then the company is required to respond under the penalty for the unlawful act of its employe.

WILLIAM L. DAY, *United States attorney*, JOHN S. PRATT, *assistant United States attorney*, and ROSCOE F. WALTER, *special assistant United States attorney*, for the United States.

JULIAN H. TYLER, for defendant.



## STATEMENT OF FACTS.

The defendant company was charged with hauling upon its railroad its own engine No. 90 when it was not equipped in compliance with the Federal safety-appliance law, in that the uncoupling lever was missing from the "A" end of the engine. The defense was made that inasmuch as the uncoupling lever had been removed by the employees of the defendant company for some reason best known to themselves and without the order or consent of the company, it should not be held to answer for such act of its employees, because the very object of the act under which this suit is brought is to secure the safety of such employees.

U. S. V. C., H. & D. R. R. CO.

## OPINION.

(On motion by plaintiff for judgment on the pleadings.)

TAYLER, *District Judge* (orally):

I suppose that the administration of this law must of necessity be attended with a certain amount of strictness of construction, and, in many cases, of hardship. It is practical results which the act seeks to accomplish. It seeks to insure the safety of employees, in so far as that may be accomplished by regulating coupling devices and grab-irons. It is perfectly conceivable that in four cases out of five the condition in which the grabiron or the coupling device is found may be due to the carelessness or willful act of one of the very class of employees whose safety is sought by the legislation. Where an act lays the unqualified duty upon a railroad company to keep its coupling devices in a certain condition and one of its employees deliberately puts it in another condition, which is a condition that the law undertakes to prevent, then the corporation is required to respond, under this penalty, for the unlawful act of its employees.

I do not see how we can escape the rule of law which makes the corporation responsible for the acts of its employees, because it is only through employees as its representatives that it can act at all. From the standpoint of practical administration of the law, it would be practically impossible to administer it if it should be held that it was a defense to a charge that the coupling devices were not in the condition which the law requires, or that a grabiron was in a condition that was unlawful, that such condition was due to the act of one of a class of employees for whose benefit and protection this legislation was enacted, and the corporation was therefore not liable. If that was true, the statute would be in many cases practically inoperative.

If I catch the spirit of this law as that spirit has been declared, especially in this latest case decided by the Supreme Court on the 18th of May (*Railroad Co. v. Taylor, admx.*), then certainly it must be said that the fact that the condition in which the lever which ought to be attached to a coupling device is found, is due to the willful act of an employee, yet since the result is the failure to perform an unqualified duty laid upon the railroad company by Congress, it must be said to be a violation of the law.

It will be necessary to sustain the motion for judgment on the pleadings, and an exception will be noted.

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UNITED STATES *v.* ATCHISON, TOPEKA & SANTA  
FE RAILWAY COMPANY.

(In the United States District Court for the Northern District of  
California.)

*Decided December 1, 1908.*

(Syllabus approved by the court.)

1. ~~M~~ a carrier hauls over its line any cars which can not be coupled automatically by impact, either by reason of being improperly

- equipped, or the equipment being out of order, or disconnected, or otherwise inoperative, the act is in violation of the Safety Appliance law.
2. The Safety Appliance statute applies to the coupler on each end of every car subject to the law, and it is wholly immaterial in what condition was the coupler on the adjacent car, or on any other car or cars, to which each car sued upon was or was to be coupled.
  3. Carriers are required immediately to repair defects in cars caused during the time they are being hauled, if they can do so with the means and appliances at hand at the time and place, or when such condition should have been discovered by the exercise of reasonable care. If requisite means are not at hand, carriers have the right, without incurring the penalty of the law, to haul the defective car to the nearest repair point on their line. But if they haul such car from a repair point, they are liable for the statutory penalty.
  4. It is the duty of the carrier, subject to the Safety Appliance Acts, to establish reasonable repair points along its line for the making of repairs of the kind necessary to comply with the law. At such repair points there should be the material and facilities to make all such repairs.

ALFRED P. BLACK, *Assistant United States attorney*, and  
MONROE C. LIST, *special assistant United States attorney*,  
for the United States.

C. L. BROWN and HORACE PILLSBURY, for the defendant.

#### INSTRUCTIONS TO JURY.

DE HAVEN, *District Judge* (charging jury):

You are instructed that section 2 of the safety-appliance act imposes upon the defendant an unqualified duty to equip its cars with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars; and if the defendant hauled over its lines of railroad any cars which could not be so operated, either by reason of being improperly equipped, or by reason of the original equipment being out of order, or disconnected, or otherwise inoperative, your verdict should be for the Government as to each and every car so hauled.

You are instructed that section 2 of the safety-appliance act applies to the coupler on each end of every car subject to the law, and it is wholly immaterial in what condition was the coupler on the adjacent car, or on any other car or cars, to which each car sued upon was or was to be coupled. The equipment on each end of every car must be in such condition that whenever called upon for use it can be operated without the necessity of men going between the ends of the cars.

You are instructed that in actions arising under the safety-appliance act the Government is only required to prove by a fair preponderance of the evidence the existence of the defects as set out in the complaint.

If from the evidence you find that the cars, or either of them, described in the petition, or in some count thereof, were equipped with the requisite couplers and grab irons, and that they were in the condition required by the law when they were received by the defendant to be hauled over its line of railroad as stated, but during the time they were being so hauled the couplers or grab irons from any cause became injured or out of repair upon any of the cars so that they were not in an operative condition, then the defendant would be required to immediately repair said defects and put the appliances in operative condition if it could do so with the means and appliances at hand at the time and place when and where it discovered their defective and inoperative condition, or when such condition should have been discovered by the exercise of reasonable care on the part of its agents or servants charged with that duty. But if it did not at such time and place have the requisite means or appliances at hand to remedy such defect and put the couplers and grab irons in operative condition, then it would have the right, without incurring the penalty of the law, to haul such car or cars to the nearest repair point on its line where such defects could be repaired and the appliances put in operative condition. But if such defective or inoperative condition of the couplers and grab irons existed at a repair point on defendant's line or at a place where

such defects could have been remedied, then if it hauled said cars from such place in such condition it would do so at its peril and be liable for the statutory penalty for so hauling or using such car described in any count of the petition.

You are instructed that it is the duty of a railroad company, subject to the provisions of the safety appliance act, to establish reasonable repair points along its line of railway for the making of repairs of the kind necessary to comply with the law; that is to say, repair points at places where they are reasonably required; that it is also the duty of such railroad company to have on hand at such repair points the material and facilities necessary to make all such repairs, and that such railway company must use reasonable foresight in providing material and facilities for such purpose; and if the jury believes that the defendant hauled any car defective as to safety appliances over its line of railroad from any such repair point, where by the exercise of reasonable diligence and foresight such repairs could have been made, your verdict should be for the Government as to each and every car so hauled.

You are instructed that if the defendant hauled any car over its line of railroad from or through any point in a defective condition, it is wholly immaterial that the defendant had no shops, material, or facilities for repairing the defects at that place, if it can be shown that said car had started from a repair point upon the line of defendant's railroad in the same defective condition, and where such repairs could have been made had the defendant exercised reasonable diligence and foresight in providing such repair point with the proper material and facilities for the making of all repairs necessary to comply with the safety appliance act, your verdict should be for the Government as to each and every car so hauled.

Your verdict should be for the Government as to each and every car so hauled upon that state of facts.

(The jury returned a verdict for the United States on the second, fourth, fifth, and eighth causes of action, and not being able to agree as to the balance of the counts, was discharged.)

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UNITED STATES *v.* NEVADA COUNTY NARROW  
GAUGE RAILROAD COMPANY.

(In the District Court of the United States for the Northern District  
of California.)

*Decided November 28, 1908.*

(Syllabus by the court.)

1. In an action brought to recover the statutory penalty under the Safety Appliance Acts a preponderance of the evidence that the defective car was hauled as alleged is sufficient to charge the defendant.
2. If the coupling and uncoupling apparatus on a car is so constructed that in order to open the knuckle when preparing the coupler for use or in uncoupling the car it is reasonably necessary for a man to place part of his body, his arm, or his leg in a hazardous or dangerous position such car is not equipped as required by section 2 of the Safety Appliance Act.

STATEMENTS OF FACTS.

The Interstate Commerce Commission lodged with the United States attorney information showing violations of Safety Appliance Law by the Nevada County Narrow Gauge Railroad Company. The declaration was in two counts, each count charging a violation of section 2 of the statute, the allegation being that the couplers were out of repair and inoperative.

ALFRED P. BLACK, *assistant United States attorney*, and  
MONROE C. LIST, *special assistant United States attorney* for  
the United States.

FRED SEARLS, for defendant.

## INSTRUCTIONS TO JURY.

DEHAVEN, *District Judge* (charging jury):

The statute under which this suit is being prosecuted makes it unlawful for any common carrier engaged in interstate commerce "to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars."

The complaint in this case charges the defendant with a violation of this statute, and the question is for you to determine; it is a simple question of fact for you to determine.

The jury is instructed that if it believes from a preponderance of the evidence that the defendant hauled the car, as alleged in the first count of plaintiff's petition, when the coupling and uncoupling apparatus on either end of said car was so constructed that in order to open the knuckle when preparing the coupler for use it was reasonably necessary for a man to place part of his body, his arm, or his leg in a hazardous or dangerous position, then its verdict should be for the Government.

You are instructed that if you believe from a preponderance of the evidence that the defendant hauled the car, as alleged in the first count of plaintiff's petition, when said car was not equipped with couplers coupling automatically by impact and which could be both coupled and uncoupled without the reasonable necessity of a man going between the end sills of said cars, then your verdict should be for the Government.

There are two counts in this petition. The first one is the only one that is contested; the second has been admitted by the defendant—that is, there is no defense to it.

The form of the verdict is: "We, the jury, find for the"

plaintiff or defendant, as you believe, on the first count of the petition, and for the plaintiff on the second count of the petition.

Verdict for Government on both counts.

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UNITED STATES *v.* CHESAPEAKE AND OHIO  
RAILWAY.

(In the District Court of the United States, Southern District of West Virginia.)

*Decided December 2, 1908.*

1. A suit for the penalty prescribed in section 6 of the federal safety appliance act of March 2, 1893, as amended April 1, 1896, as amended March 2, 1903, is a civil action, and in such suit to entitle the Government to recover it is necessary that the facts which constitute a violation of the act be proved by a preponderance of the evidence, and not beyond a reasonable doubt.
2. The statute requires that the coupler on each end of every car hauled in a train containing interstate commerce shall be in operative condition as required by the act, and this whether the car be loaded or empty.
3. In counting the cars in a train to ascertain the percentage of cars equipped with air appliances, as required by the act, the engine and tender are to be counted as separate and distinct cars.
4. If a railroad company subject to the act hauls a car or train in interstate traffic not equipped as required by the statute it does so in violation of the law.

ELLIOT NORTHCOTT, *United States attorney*; H. DELBERT RUMMEL, *assistant United States attorney*; ROSCOE F. WALTER, *special assistant United States attorney*, for plaintiff.

SIMMS, ENSLOW, AND FITZPATRICK for defendant.

KELLER, *District Judge* (charging jury):

Gentlemen of the jury, this is a civil action brought by the Government of the United States against the Chesapeake and Ohio Railway Company, under the provisions of what



are known as the "safety appliance acts;" to recover penalties for the alleged violation of those acts, the declaration or petition containing 17 counts. The first two of which, however, allege in different terms the same violation, and the 5th and 6th of which allege in different terms the same violation; therefore before this case was submitted to you the Government withdrew from your consideration counts 1 and 5 and left the declaration consisting of 15 counts, which are numbered, respectively, from 2 to 4 and 6 to 17.

There are 15 separate violations of the law charged here. Now, I have but very little to say to you, but I want to give you the legal principles so far as I think should govern your consideration of this case.

First, I will say that, the action not being criminal, the Government is simply obliged to prove the facts which constitute a violation of this act by a preponderance of the evidence, and not, as in criminal actions, beyond all reasonable doubt.

I also instruct you that upon the question of the safety appliances to wit, couplers upon cars moved by a railway engaged in interstate commerce, that the statute requires the coupler on each end of every car be in operative condition, so that a person need not go between the cars to couple or uncouple any two cars, no matter on which side of the train he is.

It was in evidence in this case that the coupling device on the end of the car, joined to another, in certain instances were out of order, so that that particular coupler could not be operated, and although it may have been true that the coupling device on the other car attached to that could have been operated, it would be from the other side only of the train; and such a condition existing, was a violation of the terms of the act, for which if the car was being moved in a train carrying interstate commerce the railway company would be liable.

I also instruct you that the loading of the car is immaterial.

It is immaterial whether it be empty or loaded, if it is involved in the movement of a train containing interstate traffic, and the Government in the preparation of its declaration in one or more counts in which that question was involved was careful to allege in such counts that in the train of which this car out of order was a part there was at least one car loaded with traffic consigned to points without the State of West Virginia.

I have been asked to give you certain instructions on behalf of the defendant in the case, one of them being the instruction that I have already embodied in my charge to you, to the effect that it is necessary that the Government prove its case by a preponderance of the evidence.

I was also asked to instruct you regarding the violations charged in the 2nd count and in the 6th count, that in fixing the number of cars in a train the engine and tender are to be counted as two separate and distinct cars. I think that is correct. The only effect of that would be in determining whether a sufficient proportion of cars were equipped with air, under the law as it was introduced in evidence to you. You will recall that in the act it was provided, that the Interstate Commerce Commission might from time to time determine what proportion of a train must be equipped with air brakes under the control of the engineer, the act at the time of its passage fixing 50 per cent. as the minimum proportion of cars to be so equipped; and later under this power of determination the Interstate Commerce Commission, by resolution, raised that minimum to 75 per cent. It is alleged in count 2 and in count 6 that in the 2 trains referred to in those counts this minimum of cars operated by the engineer by air power was not reached. In other words, that in one train but 71 per cent. in place of 75 per cent. were so equipped, and the other one, I believe, less.

Now, I think that is a correct interpretation of the law, that in determining the proportion of cars controlled by air you should count the engine and the tender as 2 of

the cars, they being, unless shown to be otherwise, equipped with air, because the engineer controls the air from the engine.

However, according to my understanding of the testimony in this case, that would not affect the defendant upon these charges, because according to my recollection of the testimony, and you will no doubt recall it, the train referred to in count 2 is alleged to have been composed of 45 cars, exclusive of the engine and tender, of which 13 were not equipped with air so as to be under the control of the engineer. Now, adding to the 45 cars the 2—respectively, engine and tender—you have 47, and 75 per cent. of 47 would require that at least 35 cars, including the engine and tender, be so equipped as to be under the control of the engineer for air braking, which would leave 12 as the maximum number that could be without such control. The proof in the case, as I recall it, was that there were 13 cars without such control, and if you find that to be the fact the statute was violated. As to the other train referred to in count 6, my recollection is that the percentage of cars equipped with air was smaller than in the one I have referred to.

I have been asked to give you an instruction on behalf of the Government, and I do so accordingly:

The court instructs the jury that if they believe from the evidence that the defendant company hauled the trains and cars as alleged in the declaration in the condition alleged in said declaration, then they shall find for the plaintiff on the counts, except 1 and 5, which have been withdrawn.

In other words, the Government's evidence in this case, if believed by the jury, makes a case under the statute, and therefore, if you believe the evidence of the Government, it would be your duty to find on each count except the first and fifth.

Verdict for Government.

UNITED STATES *v.* SOUTHERN PACIFIC COMPANY.

(In the United States District Court for the Northern District of California.)

*Decided December 4, 1908.*

(Syllabus approved by the court.)

1. If a carrier hauls over its line any cars which can not be coupled automatically by impact, either by reason of being improperly equipped or the equipment being out of order or disconnected, or otherwise inoperative, the act is in violation of the safety-appliance law.
2. The safety-appliance statute applies to the coupler on each end of every car subject to the law, and it is wholly immaterial in what condition was the coupler on the adjacent car, or on any other car or cars, to which each car sued upon was or was to be coupled.
3. Carriers are required immediately to repair defects in cars caused during the time they are being hauled, if they can do so with the means and appliances at hand at the time and place, or when such condition should have been discovered by the exercise of reasonable care. If requisite means are not at hand, carriers have the right, without incurring the penalty of the law, to haul the defective car to the nearest repair point on their line. But if they haul such car from a repair point, they are liable for the statutory penalty.
4. It is the duty of the carrier subject to the safety-appliance acts to establish reasonable repair points along its line for the making of repairs of the kind necessary to comply with the law; at such repair points there should be the material and facilities to make all such repairs.
5. The railway company is under no obligation to receive from any other company cars defective as to safety appliances and when it does receive cars from another company at any point it must know at its peril that each car so received is equipped with the safety appliances required by law, and that such appliances are in good order and condition.
6. It is the use of a car in a defective condition that the law seeks to prevent, and not the length of the haul.
7. If an employee of a railway company deliberately puts coupling devices on a car being used in interstate traffic in a condition which the law undertakes to prevent, then the company is liable to respond under the penalty for the unlawful act of the employee.

ALFRED P. BLACK, *assistant United States attorney*, and  
MONROE C. LIST, *special assistant United States attorney*  
for the United States.

CHARLES P. HEGGERTY for the defendant.

INSTRUCTIONS TO JURY.

DEHAVEN, *District Judge* (charging jury):

You are required to return a verdict in each of these cases. The first one is 13757, and contains ten causes of action; the second one is numbered 13760, and contains two causes of action.

The first two causes of action stated in No. 13757 charge a violation of section 1 of what is known as the safety appliance act. In reference to those two counts, I now instruct you it will be your duty to return a verdict for the Government. The remainder of the counts in No. 13757 charge a violation of section 2 of the safety appliance act. And that you may understand precisely the questions of fact upon which you are called to pass, I will read this section of the law to you:

“That from and after the first day of January, eighteen hundred and ninety-eight it shall be unlawful for any such common carrier”—that is, a common carrier engaged in interstate traffic—“to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.”

This section of the law applies to the coupler on each end of every car subject to the law, and it is wholly immaterial in what condition was the coupler on any adjacent car or on any car to which each car sued upon was or was to be coupled. The equipment on each end of every car must be in such condition that whenever called upon for use it can be operated without the necessity of men going between the ends of the cars.

The law also means that each car must be equipped with an uncoupling lever on each end thereof, by means of which such car can be at all times uncoupled from another car by a man standing at one end on the side of the car, and without the reasonable necessity of going between such car or any other car, or without going around the end of the train in which said car might be hauled, or without crawling under or over said cars, in order to reach the uncoupling lever of the adjacent car.

While the safety-appliance law does not ask a railway company to do the impossible, it does, nevertheless, place upon such company the responsibility of properly equipping its cars in the first instance, and the maintaining of such equipment in good operative condition at all times thereafter. Of course, if, while a car is being hauled between repair stations, some defect occurs to its safety appliances, such railway company must use the utmost care to discover and repair such defects, if the nature of the repairs will permit of their being made at that time and place. Should such defect be of a heavy nature only to be made at repair stations, then the company would have the right, without incurring the penalty of the law, to haul such car to the nearest place where such repairs can be made. In doing this, the company can not choose its place of making repairs, but must avail itself, for that purpose, of the nearest point where, by the exercise of diligence and foresight, it may prepare to make such repairs. And it is the duty of every railway company subject to this law to establish reasonable repair points along its line of railroad for the making of all repairs necessary to comply with the law; that is, it is its duty to establish repair points at all places along the line of road where it is reasonably necessary that they should be established in order faithfully to comply with the law. Inasmuch as inability alone will not excuse a company from a literal compliance with the law, it is the duty of such company to have the material and facilities on hand at every repair point to make repairs of the kind

necessary to comply with the provisions of the safety-appliance act. And if a defect exists at a repair point, or at any place where such defect could have been repaired, and the company moves the car while in the defective condition, it does so at its peril, and it becomes then subject to the penalty of the law. The law is not satisfied by the exercise of reasonable care to this end; but the company must at its peril discover and repair all defects before removing a car from a repair point.

A railway company is under no obligation to receive from any other company cars defective as to safety appliances. and when it does receive cars from another company at any point it must know at its peril that each car so received is equipped with the safety appliances required by law, and that such appliances are in good order and condition.

The penalty under the safety-appliance act applies to every defective car hauled contrary to its provisions, whether or not each car was hauled separately or in a train together; and it matters not how far each car was hauled; it is the use of the car in a defective condition that the law seeks to prevent and not the length of the haul.

Now, as to the different counts:

In the first and second counts of 13757 you are instructed to find for the plaintiff.

The third count charges the hauling of C., B. & Q. car No. 61488 when the coupling and uncoupling apparatus was missing from the B end and when said car was chained to another car. If you believe that the defendant so hauled this car from Truckee in this condition, and that Truckee was a repair point along the line of the defendant company, your verdict should be for the Government.

The fourth count charges the hauling of S. P. car No. 48602, when the knuckle was missing from the A end and when the car was chained to another car. You are instructed that the law lays an unqualified duty upon a railroad company to keep its coupling devices in a certain prescribed condition, and if an employee of such company deliberately puts

such devices in another condition, which condition the law undertakes to prevent, then the company is liable to respond under the penalty for the unlawful act of the employee, and if you believe from the evidence that the knuckle was removed from this car for the purpose of chaining it to another car, and that the car was so hauled in interstate traffic in that condition, and in that condition it would be necessary for a man to pass between the end of that car and an adjacent car in order to couple and uncouple them, your verdict should be for the Government.

The fifth count charges the hauling of B. & O. car No. 57286, when the keeper or inner casting was broken on one end and the uncoupling lever hanging down on the coupler. If you believe that this uncoupling lever was in such condition that any reasonable effort would not operate the same, and that in order to uncouple this car from another car it would have been reasonably necessary for a man to go between the cars, and that in that condition the car was hauled over the line of defendant's road in interstate traffic, then your verdict should be for the Government on that count.

The sixth count charges the hauling of C., M. & St. P. car No. 58960, when the bottom clevis pin was missing on the A end. If you believe that the car was in that condition, and that the absence of this pin rendered the uncoupling lever inoperative, and that in order to uncouple this car from another car it was reasonably necessary for a man to go between the ends of the cars, and that in that condition the car was hauled over the line of defendant's road in interstate traffic, then your verdict should be for the Government.

The seventh count refers to a "kinked" chain. If this car left Truckee while the chain was so "kinked," and while in this condition the coupler was inoperative, requiring the reasonable necessity of a man to go between the cars to couple or uncouple them, your verdict should be for the Government.

The eighth and ninth counts are similar to the fifth and seventh counts, respectively, and what I have said in regard to those, you can apply to these counts.

The tenth and the last count in No. 13757 charges the use



of a locomotive engine when the coupler was missing from the A or front end. It is not necessary that this end of the locomotive was used or was coupled to any car, that is, front end or A end; it is the use of the locomotive in a defective condition that the law seeks to prevent, and if you believe that this locomotive was used by the defendant upon its line of railroad in connection with other cars engaged in hauling interstate traffic, and not used for the purpose of taking it to the nearest point where it could be repaired, your verdict should be for the Government. Of course, if you find that it was only taken to Sparks, and find that that was the nearest place where it could be repaired, and that it was only taken there for that purpose, then your verdict should be for the defendant on that count.

The first and second counts, and the only counts, in case No. 13760, charge the hauling of two cars chained together. If you believe that these cars were delivered to the Southern Pacific Company in such a condition by another company, that is, if you believe they were delivered to them in such a condition as has been testified to by the witnesses for the Government, and you should find that the defendant in hauling interstate traffic used them on its train engaged in interstate traffic, your verdict should be for the Government. One carrier can not receive a defective car from another carrier and excuse itself; it must discover such defect at its peril before it receives and hauls any such car in interstate traffic.

I need not say to you, but I will say to you, that you are the exclusive judges of the credibility of the different witnesses who have testified in your hearing; that is, you must determine for yourselves which witness or witnesses you will believe, and then after you have fixed that in your mind you are also the exclusive judges of what ultimate facts are shown by such testimony.

In considering this testimony, positive testimony is to be preferred to negative testimony, other things being equal;

that is to say, when a credible witness testifies as to the existence of a fact at a particular time and place and another equally credible witness testifies to having failed to observe such fact, the positive declaration is ordinarily to be preferred to the negative in the absence of other testimony or evidence corroborating the one or the other..Nevertheless, that is a question for you solely in passing on the weight to be given to this positive and negative testimony. If, in your judgment, the testimony of the witness who says that he did not see a thing is entitled to weight; that the circumstances surrounding him at that time, at the time he made the examination, were such that if the fact had existed he would have seen it, then as a matter of course you would be at liberty to find that the fact did not exist; that is simply a rule of common sense in weighing testimony.

In regard to the burden of proof, the burden of proof is on the Government to establish by preponderance of evidence the facts charged in the different counts of the petition. And by a preponderance of evidence is not meant the greater number of witnesses, but it means that evidence which to your mind is the most satisfactory and is entitled to the greatest weight.

A JUROR. I should like to ask a question: In taking that engine from Truckee to Sparks, is it a breaking of the law as interpreted by hitching it to a train, or does it have to go down alone?

The COURT. If Truckee was a repair point and a place where the engine ought to have been repaired, and it was attached to a train engaged in interstate traffic and taken to Sparks, that would be a violation of the law. But if Truckee was not a repair point, and the engine could not have been repaired at Truckee, and was simply taken down to Sparks for the purpose of repair, I should say that that would not be a violation of the statute.

Another JUROR. I should like to ask a question in regard to the two cars at Richmond: Would those two cars be considered as engaged in interstate traffic?

The COURT. That is a question for the jury to determine from the evidence in this case. If they were attached to other cars engaged in interstate traffic, then they would be engaged in interstate traffic.

Another JUROR. If the engine referred to needed repairs, and could only be repaired at Sparks, but was used between Truckee and Sparks in the hauling of a train as far as that point, should we find for the Government?

The COURT. If the engine could not be repaired at Truckee, and the company, under the law I have laid down before you, was not required to be able to repair it there, and it was moved to Sparks for the purpose of being repaired, I should say that the mere fact that it was attached to an interstate traffic train would not render the company liable if the main purpose in removing was to repair it.

(The jury returned the following verdict: In case 13760, for the United States; in case 13757, for the United States on the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, and 9th causes of action set forth in the complaint; and for the defendant on count 10.)

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UNITED STATES *v.* BOSTON & MAINE RAILROAD  
COMPANY.

(In the District Court of the United States for the District of  
Massachusetts.)

*Decided January 5, 1909.*

(Syllabus by the court.)

1. Section 4 of the safety appliance act requires secure grab-irons or handholds at those points in the end of each car where they are reasonably necessary in order to afford to men coupling and uncoupling cars greater security than would be afforded them in the absence of any grab-iron or handhold at that point or of any appliance affording equal security with a grab-iron or handhold.

2. If at any place in the end of a car there is not a grab-iron or handhold, properly speaking, but some other appliance, such as a ladder or brake lever, which afforded equal security with a grab-iron or a handhold at that point, the Federal safety appliance law so far as grab-iron or handhold at that point is concerned has not been violated. Having something there which performs all the functions of a grab-iron or handhold is just the same thing as having what is properly called a grab-iron or handhold at that point.
3. Unless the Government satisfies a jury by a preponderance of the evidence that there was no grab-iron or handhold on the car where there should have been one, the jury should find for the railroad company.
4. A man engaged in connecting or disconnecting the air hose between the cars is engaged in coupling or uncoupling cars within the meaning of the safety appliance act, if it is necessary for him to connect or disconnect that hose in order to connect or disconnect the cars.
5. Where a car is not properly provided with grab-iron on a given day, and the train stops for a certain time and then goes on again, there are not two violations of the law, but only one, because the car is all the time being moved in the same train. It makes no difference that it is being so moved on two different days.
6. A "train" is one aggregation of cars drawn by the same engine, but if the engine is changed then there is a different train.

WILLIAM H. GARLAND, *assistant United States attorney*,  
and PHILLIP J. DOHERTY, *special assistant United States attorney*, for the United States.

CHARLES S. PIERCE, for defendant.

#### INSTRUCTIONS TO JURY.

DODGE, *District Judge* (charging jury):

The statute which we are considering in this case is a statute passed by Congress under the power which is intrusted to Congress by the Constitution to regulate commerce between the several States. Congress makes this law in regulation of interstate commerce; it has the power to make such regulations. If we were dealing here with a railroad or a train which was not engaged in interstate com-

merce at all, this statute would not apply. It does not seem to be disputed in this case that the defendant railroad, and the car with which you are concerned, were both engaged in interstate commerce, and therefore were subject to the provisions of the statute. The defendant railroad is charged in the declaration which the Government has filed against it with five different violations of the statute. It is for the jury to say as to each of those violations charged whether the defendant has committed it or not.

As to three of the violations charged, while the jury is still to say whether this defendant has committed them or not, they are saved the trouble of deciding any disputed questions of fact, as this case goes to them. As to the violation of the statute charged in the second count of the declaration, the defendant admits that it has been committed, and that the jury may find for the plaintiff upon the count. The same as to the third count of the declaration, the jury are to find for the plaintiff also on that count by consent of the defendant.

As to the fourth count of the declaration, the court has ruled that the evidence is not sufficient to warrant a verdict for the plaintiff, and the jury therefore will find for the defendant as to that count by direction of the court. You are aware, gentlemen, that in all cases tried before you, questions of law are for the court and questions of fact are for the jury. The question presented here on the fourth count of the declaration is an example of a question of law. The court takes upon itself the responsibility of directing the jury to find for the defendant on that count. In this instance, and in all other instances where either party thinks that the court has decided the question wrongly, they have a remedy by appeal. They may go to the Circuit Court of Appeals within this circuit and have that court determine whether this court has rightly decided the question or not. But it is for you to follow the direction of this court for the time being, in order that the question may be

properly presented on appeal. Therefore although your verdict as to the fourth count is by direction of the court a finding for the defendant, it is a verdict of which the court takes the entire responsibility.

Now, gentlemen, I come to the two counts which are submitted to you for your consideration. They both relate to the same car—a car No. 24089, a car marked “New York, New Haven & Hartford Railroad,” a box car—and the Government charges as to that car, while being hauled in a train from Springfield to the Brightwood yard, that on September 19, 1907, it was not provided with a grab-iron or handhold such as the law requires. And in the fifth count, as to the same car, the Government charges that on September 20, 1907, while being moved from the Brightwood yard northerly, it was not provided with a grab-iron or handhold such as the law requires. It is not disputed, as I have stated, that this car was being used in interstate commerce at these times. Now, the question for you to decide is: Did that car, or did it not, have on it grab-irons or handholds such as the statute requires that it should have while it was being moved by the railroad in interstate commerce?

I will read to you once more the language of the section of the statute with which we are concerned:

“From and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.”

There is no question made either on September 19 or September 20 about the sides of this car. We are concerned only with the ends. Now, taking that section as it stands, and giving due weight to the language in which the requirements are expressed, we have to consider just what they mean as applied to the question arising in this case, and I

shall instruct you, gentlemen, that section 4 requires secure grab-irons or handholds at those points in the end of each car where they are reasonably necessary in order to afford to men coupling or uncoupling cars greater security than would be afforded them in the absence of any grab-iron or handhold at that point or of any appliance affording equal security with a grab-iron or handhold. If at any place in the end of this car there was not a grab-iron or handhold, properly speaking, but some other appliance, such as a ladder or brake lever, or whatever else you please, which afforded equal security with a grab-iron or a handhold at that point, then I shall instruct you that the law has not been violated so far as a grab-iron or handhold at that point is concerned. Having something there which performs all the functions of a grab-iron or a handhold is just the same thing as having what is properly called a grab-iron or a handhold at that point. It may not be possible to say that a coupling lever or a ladder is a grab-iron or a handhold, but if it affords the same security to a man who may need to use one that a grab-iron or a handhold, properly speaking, would afford, then, in my judgment, the statute has not been violated.

The question of fact, therefore, for you is: Are you satisfied by a preponderance of the evidence that there was anywhere in the end of this car a grab-iron or a handhold wanting where it should have been according to the test which I have given you; that is, where a grab-iron or a handhold would be reasonably necessary in order to afford to men coupling or uncoupling cars greater security than would be afforded them in the absence of any grab-iron or handhold at that point?

Now, that question you are to determine by a preponderance of the evidence here. You have listened to the evidence of the two inspectors of the Interstate Commerce Commission, who tell you that they examined this car on the two days referred to, and they described to you pretty fully what they found on the end of the car in question, and

they tell you that at a certain place there was no grab-iron or handhold.

Now, on the other hand, you have the evidence introduced by the defendant railroad, which may induce you to think that the presence of a grab-iron or a handhold where the inspectors have said that one was absent would make no difference, so far as affording greater security to men is concerned.

You are to be satisfied by the Government in this case by a preponderance of the evidence that there was no grab-iron or handhold where there should have been one. If you are so satisfied, you should find for the plaintiff, for the Government in this case. Unless the Government has so satisfied you by a preponderance of the evidence, you should find for the defendant.

Now, you are to remember in this case that you are to decide it according to a preponderance of the evidence. In all the other cases to which you have listened here and which, as I recall it, have been criminal cases, I have instructed you that the Government, in order to convict, must prove its case beyond a reasonable doubt. This not being a criminal case, according to my view, the same rule does not prevail. A preponderance of the evidence in this case is sufficient; and what does that mean? It means that after balancing and considering the evidence on the one side and on the other you are not left in doubt, but that you find that the evidence for the Government outweighs the evidence brought here to meet it. If your minds after weighing and considering the evidence on both sides are left in doubt, if they are left equally balanced on the question, there is no preponderance of the evidence; and in that event, as I have told you, your verdict should be for the defendant. It is necessary, in order to find a verdict for the plaintiff, that the evidence for the Government should outweigh that for the defendant.

I have stated to you that grab-irons or handholds are required by the statute to be at such points in the end of



this car where they are reasonably necessary in order to afford greater security to men in coupling or uncoupling cars. Something has been said here about men connecting or disconnecting the air hose with which the air brakes are operated, and the question has been raised, is a man between the cars simply to connect or disconnect air hose a man engaged in coupling and uncoupling cars within the meaning of the statute? Now, on that point I instruct you that a man engaged in connecting or disconnecting the air hose between the cars is engaged in coupling or uncoupling cars within the meaning of the statute if it is necessary for him to connect or disconnect that hose in order to connect or disconnect the cars.

The Government claims here that it has proved to you by a preponderance of the evidence not only one violation of the statute, but two. Now, on that point, gentlemen, you will consider whether or not this car, in the first place, was unprovided with grab-irons or handholds, as it should have been, and, in the second place, whether it was moved by this railroad in more than one train. Let us suppose that you have found that that car was on a given day not properly provided with grab-irons and handholds as the statute requires. Let us suppose that that car was at the time being moved in a train. Let us suppose that that train stopped for some purpose, no matter what, for a while, and, after having so stopped for a certain time, started up and went on again. Now, in a supposed case like that, my instruction to you would be that there were not two violations of the law, but only one, because the car was all the time being moved in the same train. I should instruct you, gentlemen, that so long as the car is being all the time moved in the same train, it makes no difference that it is being so moved on two different days; that so long as the car continues being moved by the railroad on the same train it makes no difference that September 19 has run out and September 20 has come in; that that does not make two distinct violations of the statute, but the movement of the car being,

though on those two different days, all the time in one train, there has only been one violation of the statute. You will consider upon the evidence to which you have listened whether this car has been moved in more than one train. If you so find, it will be proper, provided you have been satisfied by a preponderance of the evidence that it was being so moved without the grab-irons and handholds which the law requires, to find for the plaintiff both on the first count and on the fifth count. If, on the other hand, you are not satisfied by a preponderance of the evidence that the car was moved in two trains, but was only so moved in one, that both on September 19 and on September 20 the car was continued all the time in one train, you should then find for the plaintiff only on one of those counts, either the first or the fifth, but you should not find for the plaintiff on both of them.

Is there anything else which counsel desire me to speak to the jury about?

[Counsel confer with the court at the bench.]

The COURT. In regard to what makes a train, Mr. Foreman and gentlemen, by "train" I understand one aggregation of cars drawn by the same engine, and if the engine is changed, I understand there is a different train.

Verdict for Government, four counts.

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## UNITED STATES *v.* BALTIMORE & OHIO RAILROAD COMPANY.

(In the District Court of the United States for the Northern District of  
West Virginia.)

*Decided January 18, 1909.*

(Syllabus by the court.)

1. The federal safety-appliance act makes no exception and places no limitations upon the duty of a railroad company to equip its cars with the prescribed safety appliances.

2. It is the duty of a common carrier subject to the law to use at all times reasonable care to discover and repair all defects to its equipment; but if a defect exists at a repair point, or at any place where such defect could be repaired, and the company moves such car from such a point, it does so at its peril and is liable for the statutory penalty; the exercise of reasonable care to discover and repair defects at such a place is no defense.
3. The law neither defines a handhold nor the exact location of same, and it is for the jury to determine whether a car is equipped with proper handholds or with such suitable substitutes as will give to the employees greater security in the coupling and uncoupling of cars.
4. Actions arising under the safety-appliance act are civil, and not criminal actions, and the Government is only required to establish by a preponderance of evidence the facts necessary to prove its case; and by a preponderance of evidence is not meant the greater number of witnesses, but it means that evidence which is the most satisfactory and which is entitled to the greatest weight.

REESE BLIZZARD, *United States attorney*, and MONROE C. LIST, *special assistant United States attorney*, for the United States

VAN WINKLE & AMBLER for the defendant.

#### INSTRUCTIONS TO JURY.

DAYTON, *District Judge* (charging jury):

Exercising its constitutional right to regulate commerce between the states, Congress has passed a law which provides:

That from and after the 1st day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

That on and after the 1st day of January, 1898, it shall be unlawful for any such common carrier to haul, or permit to be hauled, or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled, without the necessity of men going between the ends of the cars.

That from and after the 1st day of July, 1895, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or handholds in the ends and sides of each car for the greater security to men in coupling and uncoupling cars.

That any such common carrier using any locomotive engine, running any train, or hauling, or permitting to be hauled, or used on its line any car in violation of any of the provisions of this act shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed.

This action which you have in charge and are to determine is based upon this statute. There are five counts in the complaint charging five distinct violations of this law. There are three different verdicts that can be rendered by you, one finding the defendant guilty upon each and every count embraced in this complaint; another finding the defendant not guilty of each and every charge embraced in the complaint; and the third, finding the defendant guilty of certain ones of the charges made and not guilty of certain other ones of them. You will therefore see that in considering this matter it is your duty to take up each one of these counts in this complaint, each charge of a violation, and consider it independently of the others, and ascertain whether or not the defendant is guilty or not guilty of that specific charge in that specific instance and count.

The court wants to say to you that the safety-appliance statute makes no exception and places no limitation upon this duty of the railroad company to supply these safety devices to their cars, and when I say cars, it has been considered and held, and rightly so, that an engine and tender are embraced

within that definition. It is therefore the duty of the railroad company to use all reasonable care at all times to discover and remedy these defects when they appear in any of these safety appliances attached to an engine or a car; and if a defect exists at a repair point, or at any place where such defect could have been remedied, and the company moves the car while in the defective condition, it does so at its peril and it becomes then subject to the penalty of the law. The law is not satisfied by the exercise of reasonable care to this end, but the company must, at its peril, discover and repair all defects before moving a car from a repair point. Now, that you may understand that more fully, let me say to you that it is entirely reasonable that a railroad company should be required to maintain repair shops or repair material and make inspections and repairs at places within reasonable distances of each other; that in establishing such repair points the company has the right, in the ordinary operation of their trains between those repair points, when a train is in operation and defects arise, reasonably, to carry the car, the appliances on which are broken or defective, to the first repair point, but they do not have the right, having carried it to that point, to take it beyond that point without discovering and without making the necessary repairs to those safety appliances attached to that car, and if they do carry it beyond that point they are liable to the penalty provided for by this law.

This action is not a criminal action, but a civil one, and as a civil action the burden of proof is upon the Government to establish by a preponderance of evidence the facts necessary to show the violation of the law on the part of the defendant, and by a preponderance of evidence is not meant the greater number of witnesses, but it means that evidence which to your mind is the most satisfactory and is entitled to the greatest weight. The very reason why we have juries to determine the facts in cases like this is that they may judge of the evidence after hearing the witnesses

and that they may take all of the facts and all of the circumstances and weigh them and determine where the very truth lies. Under the ordinary rules of evidence, positive testimony is stronger than negative testimony where that negative testimony is not so strong as to make it apparent that the witnesses stating the positive fact are mistaken or untruthful. Evidence given by witnesses of the very circumstances and surroundings of the matter may frequently be of a determining character and kind. It is your peculiar province to weigh all the facts and all the circumstances and all the testimony and from them as a whole determine, as I have said, wherein the exact truth lies.

Now, I am asked by the defendant to give you this instruction, which I do. Before the jury can find the defendant guilty in this case the Government must prove by a clear preponderance of evidence that the safety appliances on the cars mentioned in the complaint were out of repair and inoperative in the particulars mentioned in the complaint, and unless the Government does establish this by clear and satisfactory evidence, the jury should find the defendant not guilty as to each car which is not thus proved to have been defective.

Gentlemen, it is for you to determine, touching the hand hold on the engine in this case, whether or not the appliance that was testified to by the witness Johnson, at the end or corner of the tender and the release bar, was a fair and proper substitute for the ordinary grab-irons referred to in this statute. If they were suitable for the purpose of enabling the operators of the train to couple and uncouple cars and were a fair substitute and suitable for that purpose, then it would be proper for you to find the defendant not guilty; if they were not suitable and proper for the purpose I have indicated, their presence could not be regarded as a compliance with the provisions of this statute. You will take into consideration the hand holds on the side of the car, in connection with the brace at the end and the release rod along

the end, and if you believe the whole to be a fair equipment and suitable and proper for the purpose of enabling the operators of the train to couple and uncouple cars, then I say it is your duty to find the defendant not guilty on that count; but if they are not suitable for that purpose and not effective for that purpose, then their presence, as I have said to you, upon this tender will not meet the requirements of this law, and of that you will judge from the testimony.

Verdict for Government, 4 counts.

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UNITED STATES *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO.

(In the District Court of the United States for the Western District of Missouri.)

*Decided February 21, 1908.*

(Syllabus by the court.)

1. The Safety Appliance Act of March 2, 1893, as amended, is a remedial statute and must have such construction as will accomplish the evident intent of Congress. *Johnson v. Southern Pacific Company*, 196 U. S., 1.
2. The placing of a "bad order" card on a car as notice to the employees that the car is defective does not prevent the movement of the car in a defective condition from being unlawful.
3. While the statute is in some aspects penal, recovery of the penalty is had by means of a civil action wherein it is necessary only to prove the facts showing a violation by a preponderance of the evidence.

STATEMENT OF FACTS.

The defendant was charged with having violated the safety-appliance act and an action in debt was brought to recover the statutory penalty of \$100. A jury was waived

and the trial was to the court. The evidence showed that the defendant hauled an Erie coal car with the uncoupling chain "kinked" and wedged in the coupler head on one end of the car. In that condition it was impossible to operate the coupler without a man going between the ends of the cars. One of defendant's engines coupled on to a "cut" of cars in which was this defective car, and hauled it to the yard of the Chicago, Burlington & Quincy Railway Company where a number of other cars were coupled on to the "cut." The entire lot was then hauled by the defendant over to the Chicago & Alton yards where five more cars were attached. One of the defendant's inspectors undertook to operate the coupler in the Union Depot and found the car defective. He then affixed a "bad order" card to the car, indicating the nature of the defect. The car was then taken by the defendant to Armourdale, Kans. The defendant contended that by placing the "bad order" card upon the car, it had complied with the statute and was not liable for the penalty.

ARBA S. VAN VALKENBURG, *United States attorney*; LESLIE J. LYONS, *assistant United States attorney*, for the United States.

FRANK SEBREE, for defendant.

#### OPINION OF THE COURT.

MCPHERSON, *District Judge*:

I find in the Johnson case as reported in 196 U. S., 1, that while the rule of construction as to penal statutes requires such statutes to be strictly construed, yet in the safety-appliance statute the design to give relief was more dominant than to inflict punishment, the act therefore falling within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs. The



rule there laid down is that the statute is to be construed sensibly and as a whole with a view to accomplish the obvious intent of Congress. In that decision the Supreme Court reversed the Circuit Court of Appeals for this circuit, because, as it said, the view of the latter court has been too narrow. The great purpose of the statute was to remedy conditions. That is the point of it.

It is remedial and preventive, and if observed will reduce to a minimum the crippling and killing of railroad employees in this country. As I said yesterday, every one of us can recollect fifteen or twenty years ago that about four times out of five when you went to shake hands with a railroad employee, either a switchman, brakeman, or freight conductor that had been raised from a brakeman you took hold of a crippled hand; fingers gone, sometimes an entire hand or leg gone, because of the extraordinary hazardous business of railroading.

The Supreme Court of the United States upheld the Iowa statute with reference to liability because of the negligence of a co-employ upon the ground that the legislature had the authority to single out the railroad and make them liable for the negligence of a co-employee, while the same would not be liable if applied to a manufacturing plant, solely because of the extremely hazardous business of railroading, placing railroads in a distinct class.

You can scarcely pick up a paper but what you read of some accident to an employee, but it used to be ten times worse. Up in Iowa we do not have one accident now to where we used to have ten. The dockets used to be crowded with work by reason of the number of these accidents, and the percentage has greatly decreased. I do not know how it is in Kansas City, but if it has not decreased, it is on account of the marvelous growth of Kansas City. But I am sure the percentage has decreased.

That is the purpose of this statute, and everyone who has humane views commends this statute. While I suppose, of course, there are no statistics to prove it, I have no doubt

that the enforcement of this statute has been a money-saving proposition to the railroad companies. I have no doubt that the occasional infliction of a small penalty of \$100 prevents many a \$5,000 and \$10,000 judgment.

But it can not be said that the statute was enacted for that purpose. It was enacted for the protection of railroad employees. It is within the knowledge of every one of us that everybody is negligent almost every day of his life. We cross these street-car tracks without a thought in our minds that we are within miles of a track. Sometimes we are reading a paper, or visiting with some friend, and if we are run down we could not recover because of our own gross contributory negligence. In a great percentage of these railroad cases the employees are denied a recovery because of their own negligence. You seldom have a case but what somebody is negligent. If there was no negligence, there would be but few cripples or untimely deaths.

What is the use of putting up a red card on the end of a car, as was done after the United States inspectors spotted the car, except to call the attention of some one to the fact that it needed repairs? That does not stop brakemen from going in there. Men are negligent because they are unthinking for the time being, and some of them have a dare-devil spirit. Any day you can stand in the railroad yards and see a switchman who stands in the middle of the track. The switch engine comes to him. He takes his life in his hands every time he does it, but he steps on the switchboard and looks around for the applause of the crowd about as much as to say, "See my agility." You can not stop that. You can not stop a man from going in between cars by putting a red sign on it, and they will not report it, because they do not care to have the hostility of the company that employs them, and they do not say anything about it unless they get hurt. You and I would do the same.

Now, while this is a penal statute, it has the form of a civil action. There was a time when the courts held in

slander and libel cases where the words used imputed a crime that the proof must convince the court or jury beyond a reasonable doubt, but I understand that the rule has been abrogated. That weight of proof is not required anywhere, except in proving an indictment, and this is not that kind of a case.

Now, this inspection of the 23d was very indefinite and vague. One man has no recollection about it at all. He placed thereon a mark "O. K." The other man has no recollection whatever, except the memorandum in his book. That kind of an inspection will not do. The next thing we know this car is on the way, and my notion about it is that the car would have been taken to St. Louis in that condition if it had not been that these Government inspectors happened along at that time. Now, if these Government inspectors, who in all cases are ex-railroad employees, could see this, why could not this train crew see it ? And they would not have seen it when they did if they had not seen these Government inspectors riding this car, and they then supposed something was wrong. The two Government inspectors were on this particular car, so if the train was cut they would still be with the car, I suppose.

Now, here is a case of \$100. If the penalty were extreme, a jury would hesitate more about inflicting the penalty. I would like it better if the same penalty was fixed in these twenty-eight hour cases. I have tried a good many of them, and I have never yet tried one that called for more than the minimum penalty, and I have never inflicted more than that. In most cases there is some substantial reason for delay, and too often a good deal of malice is behind the prosecution, not on the part of the Government officials, but on the part of the shipper. He believes he has been charged a little too much for his hay or grain, or has some other complaint. In nearly every case under that statute that I have tried, I have found that kind of a spirit behind the prosecution. Here is a class of cases where it is impossible to have any malice back of the prosecution. The penalty is

light, and in every case where the proofs are reasonably sufficient, I think it is wise and proper and benevolent to enforce the penalty. And I think it is an act of benevolence to the company itself to see to it that these things are broken up, and thereby lessen the amount they have to pay in personal injury cases. There are many thousand employees in this hazardous business, and I do not think in this case there is any sufficient excuse shown. There is no telling how long that car had been in that condition, and I have no doubt that if these Government inspectors had not been there, that car would have been hauled across the state of Missouri and then to Pennsylvania, and with what result nobody knows.

The judgment will be for the payment of the penalty of \$100, and ninety days for a bill of exceptions will be granted.

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## UNITED STATES *v.* SOUTHERN RAILWAY COMPANY.

In the District Court of the United States for the District of South Carolina.

*Decided February 24, 1909.*

1. A suit under the safety appliance act to recover penalties for violations of said act is civil and plaintiff is required only to prove its case by a preponderance of the evidence.
2. Although the defective car does not contain any interstate traffic, yet if it is hauled in a train which contains a car that is loaded with interstate traffic, the act applies.
3. Inspectors in the employ of the Interstate Commerce Commission are not required to inform the employees of the defendant of the facts found.
4. The act imposes upon the railway company an absolute duty to maintain its coupling appliance and grab-irons or hand-holds in operative condition.

5. A car coming without the state and being switched from one yard in the state to another yard in the state in furtherance of a design to transfer it to its final destination is engaged in interstate traffic.

ERNEST F. COCHRAN, *United States Attorney*, and ULYSSES BUTLER, *special assistant United States Attorney*, for plaintiff.

JACOB MULLER for defendant.

#### INSTRUCTIONS TO JURY.

BRAWLEY, *District Judge* (charging jury) :

The Court is requested by the learned counsel for the plaintiff to give you these instructions:

1. This is a civil case and the Government is only required to prove its case by a preponderance of the evidence and not beyond a reasonable doubt. *United States v. L. V. Ry.* (not yet reported), District Court; *United States v. P. & R. Ry.* 162 Fed. Rep., 403; *United States v. Chicago Great Western Ry.*, 162 Fed. Rep. 775; *United States v. B. & O. Sw. R. (C. C. A.)*, 159 Fed. Rep., 133. Granted.

2. If the jury find that the defendant hauled a car which was defective in not complying with the safety-appliance law as to coupling appliances, or grabirons, or handholds, although the defective car does not contain any interstate traffic, yet if it is hauled in a train that contains a car that is loaded with interstate traffic, then the act is violated, even though the car which contains the interstate traffic may not itself be defective. *United States v. L. & N.*, 162 Fed. Rep., 185 (District Court); *United States v. Chicago Great Western Ry.*, 162 Fed. Rep., 775 (District Court); *United States v. Wheeling & L. E.* (not yet reported), District Court. Granted.

3. Whenever a car is loaded in one state of the Union with a commodity which is destined for another state, and begins to move, then interstate commerce has begun and does

not cease till the car has arrived at its point of final destination. *The Daniel Ball*, 10 Wall., 557; *United States v. Belt Ry.* (not yet reported), District Court. Granted.

4. Inspectors in the employ of the Interstate Commerce Commission are not required to inform the employes of the defendant, when they make the inspection of the cars sued upon, of the defects found in the appliances; the jury should not discredit their testimony because the inspectors did not so inform the employes of the defendant. *United States v. Chicago Great Western Ry.*, 162 Fed. Rep., 775. Granted.

5. The safety-appliance law of Congress imposes upon a railway company an absolute duty to maintain the prescribed coupling appliances and grabirons or handholds in operative condition, and it is not satisfied by the exercise of reasonable care to that end. *St. L., I. M. & S. v. Taylor*, 210 U. S., 281; *United States v. A. T. & S. F. Ry.* (C. C. A.), 163 Fed. Rep., 517; *United States v. D. & R. G. R.* (C. C. A.), 163 Fed. Rep., 519; *United States v. P. & R.*, 162 Fed. Rep., 403. Granted.

The court is requested by the defendant to give you certain instructions:

1. This being a suit by the Government to recover a penalty the rules of criminal procedure and evidence may apply, and the defendant is presumed to be innocent of the violations of law charged against it until it is proved to have been guilty beyond a reasonable doubt.

COURT. The court refuses that instruction. The rule is this: This is a civil action to recover a penalty, and as in all civil cases the plaintiff must establish his case by clear and satisfactory evidence, and the jury must determine, if there is testimony on either side, by the preponderance of the testimony, the careful weight of the testimony.

2. As regards any material issue of fact in this case, if the jury have any doubt they should solve such doubt in favor of the defendant.

COURT. The court can not give you the instruction in that form. That is disposed of by what the court says in

refusing the first instruction. They must establish it by the preponderance of the testimony. If you have any doubt as to the preponderance of the testimony, then the plaintiff can not recover.

3. In a suit by the Government under the safety-appliance acts to recover a penalty for an alleged violation of the law by a railway company, these acts can not be regarded as imposing upon the railway company an absolute duty in the sense that it becomes penally liable for a violation of the law without regard to the question of intent or the question of diligence on the part of the company to avoid such violation. Refused.

4. If a violation of these safety-appliance acts by a railway company is unintentional and unavoidable on the part of the company, it is not liable to the penalty prescribed by the acts.

COURT. The court can not give that instruction. The question of intention does not come into play at all.

5. The jury in this case can not find a verdict for the plaintiff in this action for any other defects than those alleged in the complaint to have been defective.

COURT. The court gives you that instruction, but in construing the complaint you must give to it fair and reasonable interpretation.

6. If the jury have a reasonable doubt as to whether the cars alleged in the complaint to have been defective were in fact defective as alleged in the complaint, they should find a verdict for the defendant. Refused.

7. If the court refuses No. 6, then the burden of proof is on the plaintiff in this case, if in the minds of the jurors the evidence on any issue of facts is evenly balanced between the plaintiff and the defendant, they should resolve that issue in favor of the defendant. Granted.

8. Within the constitutional meaning and extent of the safety-appliance acts, it can not be considered that a car whose destination is a point without the state is being used in interstate commerce when being shifted from point to

point in a railway yard by a shifting engine within the state, and is not in the course of an extended movement beyond the limits of the state.

COURT. The court interprets that instruction as intended to apply to the movement of a car containing coal, which had been brought from some point in Tennessee and was intended for some point in the state of Georgia, and which was moved from one of the yards of the company to another yard of the company. If you find the fact to be that that car had been engaged in interstate commerce and had come from a point in Tennessee, and was shifted to another yard of the defendants in furtherance of the design to have it transferred to a point in Georgia, then it was interstate commerce within the meaning of the law. As to the defect in the engine, the court instructs you that if when the shifting engine began the movement of that car from one yard to the other, that engine was in good condition, the coupler was in a safe condition, and not defective, and if in the transit between the yards it became defective, then the company would not be liable, if they repaired the defect as soon as possible. All mechanical appliances are liable to get out of order in the use, and all that the company can fairly be required to do is to see that when the cars began to move, when the engine began to move, that all of the appliances were perfect, and if in the course of the movement, as the result of the movement it became defective, then the act would not apply to it, provided the company repaired it before moving again.

9. The interstate transportation by a railway company of its own property is not "interstate commerce."

COURT. The court must refuse that instruction in that shape. It will instruct you that if the car referred to, containing sand, was being moved from South Carolina into North Carolina for the company's own purposes, if it was carried on a train which was engaged in interstate commerce, and this car was defective, it falls within the denunciation of the statute still.



UNITED STATES *v.* ATLANTIC COAST LINE RAIL-  
ROAD COMPANY.

In the District Court of the United States for the District of South  
Carolina.

*Decided February 24, 1909.*

1. A suit under the safety-appliance act to recover penalties for violations of said act is civil and plaintiff is required only to prove its case by a preponderance of the evidence.
2. Although the defective car does not contain any interstate traffic, yet if it is hauled in a train which contains a car that is loaded with interstate traffic, the act applies.
3. The act imposes upon the the railway company an absolute duty to maintain its coupling appliances and grab-irons or handholds in operative condition.
4. Whenever a car is loaded in one state of the Union with a commodity which is destined for another state, and begins to move, then interstate commerce has begun and does not cease till the the car has arrived at its point of final destination.
5. Inspectors in the employ of the Interstate Commerce Commission are not required to inform the employees of the defendant of the defects found.

ERNEST F. COCHRAN, *United States Attorney*, and ULYSSES BUTLER, *special assistant United States attorney*, for plaintiff.

B. A. HAGOOD and L. W. McLEMORE, for defendant.

BRAWLEY, *District Judge* (charging jury):

Counsel for the Government has requested the following instructions:

1. This is a civil case and the Government is only required to prove its case by a preponderance of the evidence and not beyond a reasonable doubt. *United States v. L. V. Ry.* (not yet reported), District Court; *United States v. P. & R. Ry.*, 162 Fed Rep., 403; *United States v. Chicago Great*

*Western Ry.*, 162 Fed. Rep., 775; *United States v. B. & O. Swn. R.* (C. C. A.), 159 Fed. Rep., 33.

COURT: The court gives you that instruction. In other words, you will decide this case as you would any other civil case, and not as in criminal cases, where the Government must make out its case beyond a reasonable doubt. You must decide it by the preponderance of the evidence.

2. If the jury find that the defendant hauled a car which was defective in not complying with the Safety-Appliance Law as to coupling appliances or grab irons or handholds, although the defective car does not contain any interstate traffic, yet if it is hauled in a train which contains a car that is loaded with interstate traffic, then the act is violated, even though the car which contains the interstate traffic may not itself be defective. *United States v. L. & N.*, 162 Fed. Rep., 185 (District Court); *United States v. Chicago Great Western Ry.*, 162 Fed. Rep., 775 (District Court); *United States v. Wheeling & L. E.* (not yet reported), District Court. Granted.

3. Whenever a car is loaded in one state of the Union with a commodity which is destined for another state, and begins to move, then interstate commerce has begun, and does not cease till the car has arrived at its point of final destination. *The Daniel Ball*, 10 Wall., 557; *United States v. Belt Ry.* (not yet reported), District Court. Granted.

4. Inspectors in the employ of the Interstate Commerce Commission are not required to inform the employes of the defendant, when they make the inspections of the cars sued upon, of the defects found in the appliance; the jury should not discredit their testimony because the inspectors did not so inform the employes of the defendant. *United States v. Chicago Great Western*, 162 Fed. Rep., 775. Granted.

5. The safety-appliance law of Congress imposes upon a railway company an absolute duty to maintain the prescribed coupling appliances and grab-irons or handholds in operative condition, and is not satisfied by the exercise of

reasonable care to that end. *St. L., I. M. & S. v. Taylor*, 210 U. S., 281; *United States v. A., T. & S. F. Ry.* (C. C. A.), 163 Fed. Rep., 517; *United States v. D. & R. G. R.* (C. C. A.), 163 Fed. Rep., 519; *United States v. P. & R.*, 162 Fed. Rep., 403. Granted.

6. You are instructed that if you believe from a preponderance of the evidence that the defendant hauled the cars, as alleged in the first, second, third, fourth, fifth, sixth, seventh and eighth counts of plaintiff's petition, when said cars were not equipped with couplers coupling automatically by impact and which could be uncoupled without the necessity of a man going between the ends of the cars, or was not equipped with secure handholds, or with a grab-iron, then your verdict should be for the Government. *United States v. Nevada County N. G. R.* (not yet reported), District Court.

COURT: That seems to be already embraced in the previous instruction; the court gives you that instruction.

COURT: Mr. Foreman and gentlemen: The Government has offered testimony tending to show that 9 cars went out from Florence on February 19 of last year in a defective condition, and the inspectors for the Government, whose duty it was to look after these matters, testified as to the nature of those defects and that they saw the cars moving out, and that they were engaged in interstate commerce. The defendant company has offered testimony tending to show that the inspector employed by the company, whose duty it was to make repairs within the car-repair yard, repaired at least 7 cars, or had it done under his direction, and that the cars alleged by the Government's witnesses to be defective were not in point of fact defective in the particulars referred to. Now, it appears from the testimony that the inspectors made their presence known to the yardmaster of the defendant company when they arrived at the yards, some time in the morning, and they have given you the days and hours when they made their inspection of the cars. If you believe their testimony, the cars were defective at the time

they examined them; whether the defects were repaired afterwards, after the government inspectors saw them and before they went out, is a question for you, and the credibility of the witnesses is a question for you. The fact that the government inspectors did not inform the employes of the company of the fact that they found these defects is not to be taken by you as any reason for discrediting their testimony. The law does not require them to make such report. The fact that they were on the ground—were known to be there by the yardmaster—is a circumstance to be considered by you in determining whether or not that fact would or would not make the railroad parties more than usually vigilant on such an occasion, put them on their guard, the inspectors being there, going about and looking at the cars, whether or not that fact was not likely to make lazy people in charge of the yards take extra precaution to see that the cars in the yard were in proper condition, is a circumstance. Now, on behalf of the Government it is contended that even if the repairs proved to have been made by the witness, Summerford, car repairer, even if he made the repairs which he testifies to, that they were not the defects that the Government's witnesses have pointed out. That is a question of fact for you, which you must determine by your recollection of what the witnesses for the Government have testified to on that subject. Of course, if they made other repairs than those which the Government alleged were the defects, that would not relieve the company, but if the specific defects which the testimony of the government inspectors pointed out, if they were not repaired before the cars left, of course the company is liable. The company has no record of any repairs made upon cars named in the first and ninth causes of action, and if you believe the testimony of the government inspectors that those cars were defective in the particulars pointed out, it would be your duty in that case to find a verdict for the Government upon those 2 cars. As to the 7 other cars, it depends entirely upon your conclusion as to the testimony on the point whether or not those cars

were repaired before they went out. If they were, why your duty would be to find a verdict for the defendant; if they were not, it would be your duty to find a verdict for the plaintiff in the full amount claimed by them. If you find for the Government you will find so many dollars; if you find for the Government as to the whole amount then you will find for the Government \$900. If you find for the defendant you will say: "We find for the defendant." If you find that 7 of the cars were repaired before they went out, you will find in any event \$200.

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(United States Circuit Court of Appeals, Sixth Circuit.)

THE UNITED STATES OF AMERICA, *Plaintiff in error*,  
v. THE ILLINOIS CENTRAL RAILROAD COM-  
PANY, *Defendant in error*.

Error to the District Court of the United States for the  
Western District of Kentucky.

(Submitted January 13, 1909. Decided March 2, 1909.)

1. An action by the Government to recover a penalty under the safety-appliance act is a civil action with all the incidents of a civil action.
2. From an adverse judgment in the District Court the United States may have a writ of error to the Court of Appeals.
3. If a railroad company starts a car in transit with a coupling so defective that the defect could have been discovered by inspection it will be liable under the safety-appliance act; but if a car when started in transit had no discoverable defect, the company will not be liable for the use of the car in that transit for a defect occurring during such transit, if there has been no subsequent lack of diligence either in discovering or repairing the defect.
4. When the Government has proven a car was laden with interstate commerce, has defective couplings, and was hauled over the

defendant's road, the defendant has the burden to show that it used all reasonable possible endeavor to perform its duty to discover and correct the defect.

5. The statute does not require the railroad company to have its cars properly equipped at all times and under all circumstances when in use, in order to escape a liability to a penalty.

Before SEVERENS, *Circuit Judge*, and KNAPPEN and SANFORD, *District Judges*.

SEVERENS, *Circuit Judge*, delivered the opinion of the Court.

This is an action in the nature of a common law action of debt brought in the District Court by the United States against the Illinois Central Railroad Company to recover penalties of \$100 each for twenty-two alleged infractions of Section 6 of the Safety Appliance Act of March 3, 1893, each offense being set out in a separate count. Some of these counts were for hauling cars in inter-state traffic with defective automatic couplings, some with defective grab-irons and some with draw bars not on the proper level above the track. There was a plea of not guilty to each count, and special matters of defense were alleged in the several answers. The issues were tried by a jury. A stipulation as to certain facts was made by the attorneys for the parties and filed, of which the following is a copy:

"Defendant, for the purpose of this case, admits:

"1. That it is a corporation doing business in Illinois and Kentucky, and is a common carrier, transporting over its railroad in Kentucky, both cars carrying inter-state commerce and cars carrying shipments wholly intra-state.

"2. That in each of the cars in paragraphs 1, 5, 6, 7, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21 and 22 contained inter-state shipments; that each of the cars mentioned in paragraphs 4, 9 and 13, transported shipments purely intra-state, i. e., from one point in Kentucky to another point in Kentucky, and that each one of said cars was hauled by defendant in a train in which there was at least one other

car that at the time contained an inter-state shipment; and that the engines mentioned in paragraphs 2, 3 and 8 were used by defendant wholly between points in Kentucky, to-wit: Between Louisville and Central City, and that said engines hauled trains at the times mentioned in said paragraphs 2, 3 and 8 composed of cars, some of which contained traffic purely intra-state, and each one of which trains contained the car mentioned in said paragraphs respectively containing inter-state freight."

Evidence bearing upon the issues was adduced by the parties, and the jury having been instructed by the Court, rendered a verdict for the plaintiff on seven of the counts in the sum of \$100 each, and for the defendant on the other fifteen.

The plaintiff brings the case here on a writ of error. The first question arises upon a motion to dismiss the writ upon the ground that the proceedings in the Court below were essentially of a criminal nature, and that the United States cannot have a writ of error upon proceedings of that description. It seems proper to advert to certain fundamental considerations upon which the procedure in such cases as this rests, and upon which the determination of the question here raised depends.

It is urged by counsel for the defendant that the punishment prescribed by the sixth section of this Act is a penalty, that the proceeding for its enforcement is criminal in its nature, and that therefore the trial of the cause is to be governed by the rules of evidence, and the right to have a review in an appellate court is to be determined by the law applicable to a criminal prosecution. It may be admitted that in a sense the punishment prescribed by the Act is a penalty. But penalties are of different sorts. They may consist of a sum of money which the offender shall pay in atonement for his forbidden act, in other words, of a fine, or shall suffer some other form of forfeiture of property, or they may consist of the infliction of the corporal punishment of the guilty party, or they may

consist of both of these punishments. The public through its government may employ, within certain limitations, such of these various forms of punishment as it may deem just and necessary to the common welfare. Offenses range in respect of their turpitude from the smallest to the greatest; and the theory of punishment is that it shall be measured by the gravity of the offense. While it is true that the constitution and laws of the country are prescribed and enforced for the protection of property as well as of the person, yet they regard with greater concern the protection of the latter. And so, when for small offenses a pecuniary punishment is prescribed as the atonement, it has long been the practice to employ a civil action for its recovery. Assuming that the punishment is just, the consequences to the defendant are not far different from those which happen in civil actions, only it is the government which is the plaintiff. The consequences of the judgment are substantially the same to him as if the penalty was bestowed upon a private party, except with regard to the scintilla of interest he has in the public revenue. If the public may, for a sufficient reason, compel the defendant to pay a fine, it is of little importance to him whether the government keeps it for its own purposes or turns it over to another who is already indemnified. Mere academic discussion of the theory of the practice by which it is done does not interest him. Probably in all the systems of law in the State and Federal governments, there are instances where to civil liabilities there are attached penalties, there being something wanton or gross or otherwise peculiar to the liability. Yet such penalties are enforced in civil actions.

A very cogent, not to say persuasive, argument was addressed to us, founded upon the prohibition of the Constitution against subjecting a person to be twice put in jeopardy for the same offense. It is urged that this prohibition extends to a review of the trial in an appellate court; and, further, that it applies not only to prosecutions for crimes, but to prosecutions for misdemeanors also.



And we must suppose that it is thought that the protection afforded thereby extends as well to artificial as to private persons; for the defendant here is a corporation. And if a private person may invoke it in a case when only the forfeiture of property is involved, there is color for the claim that a corporation may invoke it in a like case. This seems to us to be pushing the doctrine a long way and beyond its hitherto recognized scope.

We held in *United States v. Baltimore & O. S. W. R. Co.*, 159 Fed. 33, 38, and again the case of *United States v. Louisville & Nashville R. Co.*, recently decided, that the Government was entitled to prosecute a writ of error from this court to the District Court to review the proceedings in an action of debt to recover a pecuniary penalty which alone was the punishment prescribed. To this ruling we adhere. The result is that the motion to dismiss must be overruled.

The principal questions upon the merits are two, and they arise upon the instructions given by the Court to the jury.

1st. Whether on the trial of an action such as this, the rule of the criminal law that the evidence must satisfy the jury of the guilt of the respondent beyond a reasonable doubt, applies.

2nd. Whether the judge correctly stated the law to the jury when he said (as he did in substance) that if the defendant equipped the cars with the proper appliances as required by the Act, and thereafter exercised the utmost degree of care and diligence in the discovery and correction of defects therein, which could be expected of a highly prudent man under similar circumstances, it would have discharged its duty, and would not be liable to the penalty prescribed by the statute.

Respecting the first of these questions, we have little to add to what we said in *United States v. Baltimore & O. S. W. R. Co.*, *supra*, and the observations already made in discussing the motion to dismiss the writ of error. It is

impossible for us to distinguish this case upon any substantial ground, so far as concerns the present question, from that of *Zucker v. United States*, 161 U. S. 475, where on the trial of an action by the United States to recover the value of merchandise forfeited by a fraudulent importation, the case turned upon the admissibility of certain evidence. If the action was of a criminal nature, it was inadmissible. If it was not, it should have been received. The question was much discussed by Mr. Justice Harlan, and the result was that the Court held that the evidence should have been received, and this upon the ground that it was not a criminal proceeding.

We have referred to instances where, in the enforcement of civil liabilities, penalties incurred by wrongful neglect to discharge them are also enforced; and yet we are not aware that it has ever been supposed that the rule of the criminal law respecting the degree of proof was to be imported into the trial of the civil action. The giving of such a remedy as that specified by the sixth section, without any restriction or condition, imports an action at law with the customary incidents of such an action. Being a remedy which does not touch the person, there is no such urgency for protecting him as to require that the rules for the conduct of a civil suit should be displaced, and those of a criminal proceeding be taken in. We think the law does not sanction such an anomalous compound in legal proceedings. If, indeed, there be no substantial distinction between a case where the Government retains the fine and one where it is given to a private party in excess of his otherwise legal right, there are decisions in point which hold that where the suit is a civil action for a penalty the evidence is sufficient if it preponderates, and need not be such as to remove all reasonable doubt.

*Roberge v. Burnham*, 124 Mass. 277.

*O'Connell v. Leary*, 145 Mass. 311.

*Louisville & N. R. Co. v. Hill*, 115 Ala. 334.

*People v. Briggs*, 47 Hun. (N. Y.) 266.

We are therefore of the opinion that the court erred in its instruction to the jury in this regard.

As the judgment must be reversed for the error above shown, we think it necessary to consider and dispose of the other allegations of error above stated, to the end that the court below may not be vexed with the same questions, which as seems quite certain, will arise upon the new trial. The trial of so many causes of action upon one petition creates as it did for the court below some embarrassment in dealing with the questions which arise upon the several counts of the petition. Moreover, upon the new trial the evidence may not be the same as that given on the first. Evidence of new facts may be adduced, which as we should think, would be desirable in order to make proper conclusions upon the merits of the several cases included in the petition. We shall best subserve the present purpose, by indicating the general principles by which in our opinion the trial should be governed in respect to the subject we are now considering.

The instruction given to the jury in regard to the measure of the duty imposed upon the railroad company by the provisions of the Safety Appliance Act was in the main, but not altogether, substantially in accord with the construction which we gave to them in the case of *St. Louis & S. F. R. Co. v. Delk*, 158 Fed. 931. It is urged however, by counsel for the Government that our opinion in that case has been overruled by the opinion of the Supreme Court in the case of *St. Louis & Iron Mountain Ry. v. Taylor*, 210 U. S. 281. If this seemed to us with certainty to be so, we should of course be bound to yield our own opinion to the superior authority of that court. But if the judgment of the Supreme Court has not concluded the questions now presented, we think the duty incumbent upon this court is to follow its own decision unless, indeed, it should become convinced that it was wrong. Thereupon, it will remain for the Supreme Court to determine whether the ruling it has

announced is to be extended to facts such as those of the present case.

The question recurs to what extent is a judgment of a superior court of controlling authority? We do not allude to that respect and confidence which is always due to every expression of opinion of the superior court from the subordinate court, but to those declarations of essential import resting upon the facts and leading to the conclusion manifested by the judgment. Declarations of law bearing upon the issues and indicating the proper judgment thereon are binding. The facts and law of the instant case only are in the eye and thought of the court. But expressions of opinion as to how the law would be upon facts essentially different from those in issue are not controlling in another case when such different facts and issues are presented. These rules have been declared on many occasions by the Supreme Court itself, and no appellate tribunal has more strongly emphasized them.

*Cohens v. Virginia*, 6 Wheat. 264, 399.

*Northern Bank v. Porter tp.*, 110 U. S. 608.

*Plumley v. Massachusetts*, 155 U. S. 461, 471, 474.

*Hans v. Louisiana*, 134 U. S. 1.

*United States v. Wong Kim Ark.*, 169 U. S. 649, 679.

*Harriman v. Northern Securities Co.*, 197 U. S. 244.

*Downes v. Bidwell*, 182 U. S. 258.

In the case of *St. Louis &c. Ry. Co. v. Taylor*, *supra*, the suit was an action to recover damages for a personal injury, and not a penal action such as provided by Section 6. It was found upon the provisions of those sections of the act which relate to the subject of equipping the cars and was not a prosecution for the use of such cars. Besides it appeared in Taylor's case that only one of the meeting ends of the cars which came into the collision whereby he was killed, was equipped with an automatic coupler, and that the end of the draw-bar on the other car was not so equipped but had the old style of link and pin

coupling. This latter fact was a plain violation of the law which necessarily meant that both the meeting ends should be equipped with the automatic coupling; otherwise there would be no coupling which would be automatic.

We gather from the facts stated in the opinion in the Taylor case that the defect in the couplings of cars existed when the cars started on their journey, and that plates of metal, called "shims," were provided for temporarily remedying the inequality in the height of the draw-bars. If that was so, the railroad company was chargeable with notice of the defective condition of the draw-bars when the cars were sent out and was at fault in not putting them in order, and did not relieve itself by trusting to its employees the making of the temporary makeshifts.

Whether the Supreme Court would apply the rule laid down in the Taylor case to an action brought by the Government for a penalty under section 6 of the act we do not know. While we have held that in giving an action of debt to recover a penalty, the implication is that the procedure, the pleading, the evidence, and the review of the proceedings are to be such as are incident to an action of debt, a question of much importance remains which is whether the offense being penal, the court is not to have regard to the constituents of the offense itself, and determine its quality by the tests of the criminal law. In other words, does the mere fact that the remedy is a civil action relieve the Government from proving that the offense charged was criminal in its nature and, specifically, was committed in willful neglect of the duty prescribed by law? The distinction between a remedy and the cause of action is clear enough, but the answer, notwithstanding anything decided in Taylor's case, is doubtful. Though involved in the case before us, the question has not been raised or discussed. We incline to think it should be answered in the negative, but we do not decide it.

This case was tried before the decision of the Delk case. But the opinion of the court as expressed in its instruc-

tions to the jury, in most respects, proceeded along the lines of our opinion in the case alluded to. In this latter case the facts were that the car, on which were the defective couplings, had been sent back by the Belt Line because of the defect. It had been on the dead track in the yard to await repairs, which had been sent for, and was in the midst of other cars. It became necessary to move the defective car along the track in order to release and get out the other cars. It was during this operation that the plaintiff was hurt. There was evidence from which the jury might have found that the first knowledge which the defendant had of the defect in the coupler was when the car was sent back to it and it put the car on the "dead track" for repairs, and that it had done nothing toward actually promoting the transit of the car toward its destination. It was for the time being "tied up" for repairs. Still, as the majority of the court held, it was nevertheless engaged in interstate commerce, its freight not having yet been discharged. What we said in our opinion had reference to a case so circumstanced. We were not engaged in laying down universal rules upon the general subject, but only such as we conceived to be applicable to the facts of the case then before us. In effect we concluded that if the defect had occurred at some previous time and the defendant had knowledge of it, or should, with reasonable diligence, have had notice of it, and with such knowledge, actual or implied, continued without some justifying necessity, to haul the car upon its tracks while laden with goods which were the subject of interstate traffic, it would thereby violate the statute. We still concede that to be so. We think, further that the railroad company would be liable if it starts in transit a car with a coupling containing a defect which could have been discovered by inspection; and *vice versa*, if a car when started in transit had no discoverable defect, the railroad company would not be liable to the penalty for a use of the car in the same transit by reason of a defect occurring during transit, pro-

vided there has been no subsequent lack of diligence either in discovering or in repairing the defect.

We are of the opinion that when the Government has proved that a car laden for interstate traffic and with defective couplings, has been hauled upon its tracks, the railroad company is bound to prove exculpatory facts, such as that it has used all reasonably possible endeavor to perform its duty to discover and correct the fault. We think, for example, that the court was in error in charging the jury that in the case of the cars coming from Mound City the jury might indulge the presumption that the appliances of the cars were in proper condition when they started, and that they remained so until such time as they were shown to be otherwise. We think the burden of proof was on the other party.

With regard to the sufficiency of the proof in view of the fact that the action is a civil action and is for a penalty, we have already expressed our opinion.

Now, as an original proposition we are unable to understand why it was, if Congress intended to enact such a law as it is now contended this law is, it should, after having proposed to itself the enacting a law "to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers" and having used fitting language to carry that purpose into effect and nothing more, have failed to declare that having so equipped its cars with the couplings, the carrier should be required at all times and in all circumstances when in use to have them in effective condition. To hold that Congress has done this, is to insert an interpolation into the act, and to make this interpolation such as shall require things confessedly impossible and to be apologized for by saying as counsel for the Government insist that we should, the law is so written, that it is a matter for the legislature, and not for the courts to determine. Is this a proceeding to be justified in order to make the statute mean what the coun-

sel think the law ought to be? It seems clear to us that Congress having accomplished its purpose by requiring carriers to equip their cars in the manner prescribed and to continue such equipment, was content to leave the incidents of their use to be regulated by the rules and principles of the common law.

Generally, the accepted rule is that if a given construction of a law leads to such results that it seems harsh, unreasonable or to be performed with a great excess of difficulty, the court on seeing such a prospect will turn back to see if a construction is possible whereby such consequences can be avoided and another construction imposed having a more reasonable result. Such an act, we think, ought not to be so construed as to imply the intention to impose these consequences, unless its provisions are such as to render the construction inevitable. A time honored rule for the interpretation of statutes forbids it. Said Mr. Justice Field in delivering the opinion of the Supreme Court in *United States v. Kirby*, 7 Wal., 482; "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislation intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter." This statement has been repeated by that court in numerous cases since that time; the latest being perhaps that of *Jacobson v. Massachusetts*, 197 U. S. 11. It is the opposite of this to recognize a hardship, an injustice, and then to fortify the way to it by adopting the fatalistic answer, "thus saith the law." And it is, indeed, worse than this if the law does not say it at all. It is to assume the conclusion, and then mould the premises so that they may justify the conclusion. Accidents will happen, and at places more or less remote from places of repair, or where the car cannot be left upon the track without peril to the



public as well as to the employees. Undiscoverable defects may at any time appear while the car is moving on the track in a train, and it has been hauled in that condition before it can be known. We are not prepared to believe that Congress intended to impose a law upon a business of public utility which cannot be carried on without more or less frequent violations of such law, and to fasten thereon a liability to prosecution as for a crime or misdemeanor!

Among the Fundamental Legal Principles, Broom in his *Legal Maxims*, 238, classes the maxim, *Lex non cogit ad impossibilia*, a rule of law which applies to statutes of the most positive character, statutes which cannot by any rule of construction be so interpreted as to prevent the certainty of the result. And in his commentary upon it he says; "The law in its most positive and peremptory injunctions. is understood to disclaim, as it does in its general aphorisms, all intention of compelling to impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases."

While this maxim is not uniformly applicable, as for instance when the statute relates to a dangerous business and gives a private remedy, we think it is a proper one to apply in the construction of a law inflicting a penalty, and the business to which it relates is not itself unlawful.

It was upon the application of this maxim that the case of *Chew Heong v. United States*, 112 U. S. 536, was decided. The Chinese Exclusion Acts of 1882 and 1884 forbid the re-entry of a Chinese laborer without the production of the collector's certificate which by these Acts he should obtain on leaving the United States.

But he had left prior to the date of the Acts, and so of course could not have obtained the certificate. By the treaty with China of 1880, being resident here he was entitled to go abroad and return without hindrance or condition. Congress, however, had the power to pass laws in derogation of the treaty. But although the denial of the right to return without the certificate was peremptory, the

court held that in this, the Act required an impossibility, and for the purpose of saving the right given by the treaty, it was to be presumed that Congress did not intend its prohibition to be absolute, and that the Statutes should be so construed as to avoid an unreasonable or unjust result.

On the argument, counsel for the Government when asked what language of the act created the absolute duty contended for, referred to the last clause in Section 2 which is, "and which can be uncoupled without the necessity of men going between the ends of cars," as if that language constituted an independent requirement. But this language is descriptive of the equipment required, and imports nothing in regard to the duty of the carrier when from accident or some other cause without his fault, the equipment becomes deranged. And because the statute does not make any command in that regard, the general law supplements the duty of the carrier by declaring that he shall use the utmost diligence in having the defect corrected. By this harmonious cooperation of statute and common law, the intended result is worked out without any unjust result.

The court is not at this time made up of the same members as it was when the Delk case was decided, but all are agreed that the decision was right as applied to a defect occurring during transit and that so applied we should abide by it unless it shall be overruled by the Supreme Court. Still, if it should be held that our decision in the Delk case was wrong, it does not necessarily follow that in this suit for a penalty the court below was also wrong in giving the instruction complained of.

The result of these considerations is that for the error in the instruction regarding the sufficiency and cogency of the proof required, the judgment must be reversed and a new trial awarded.



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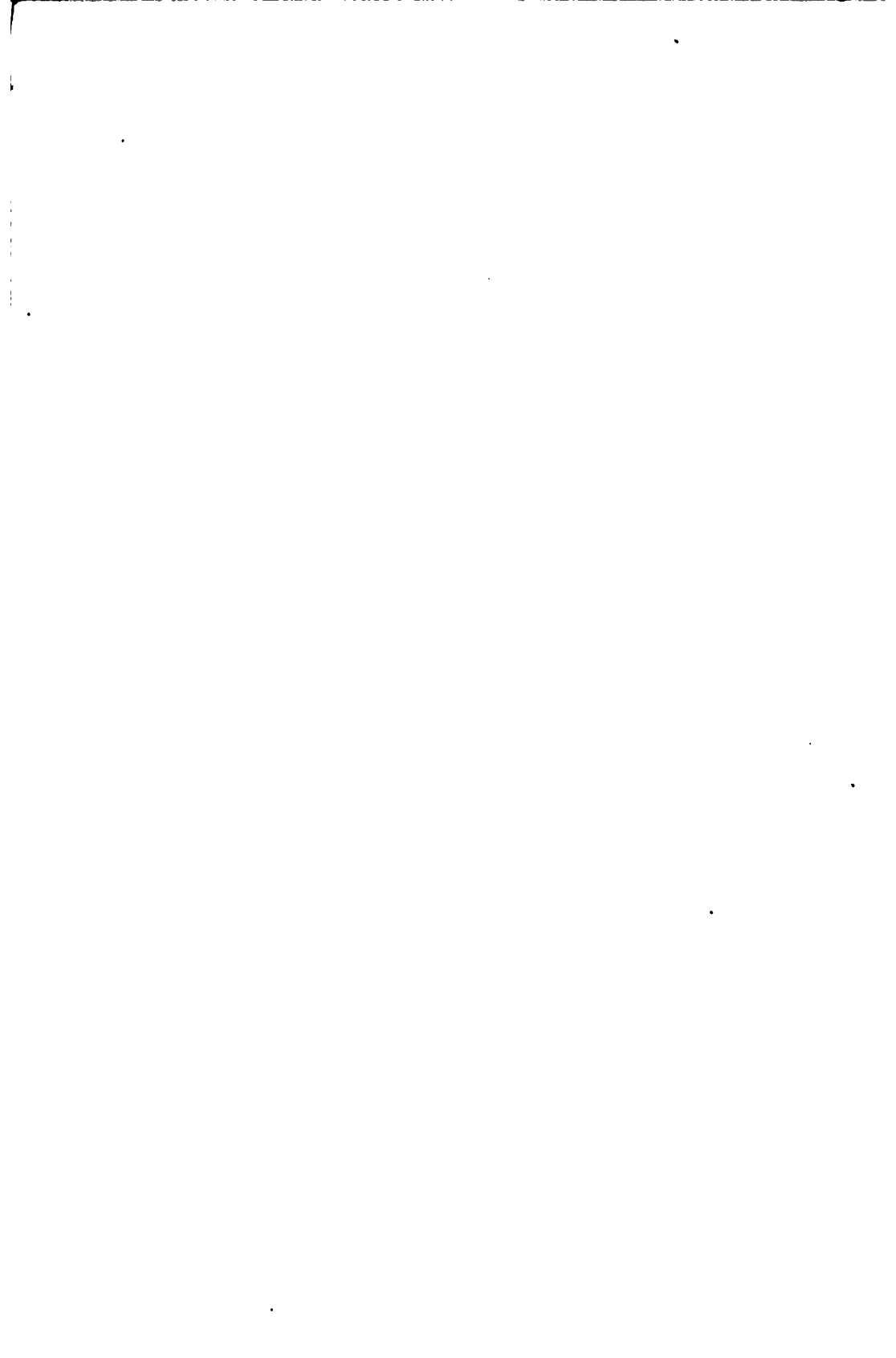
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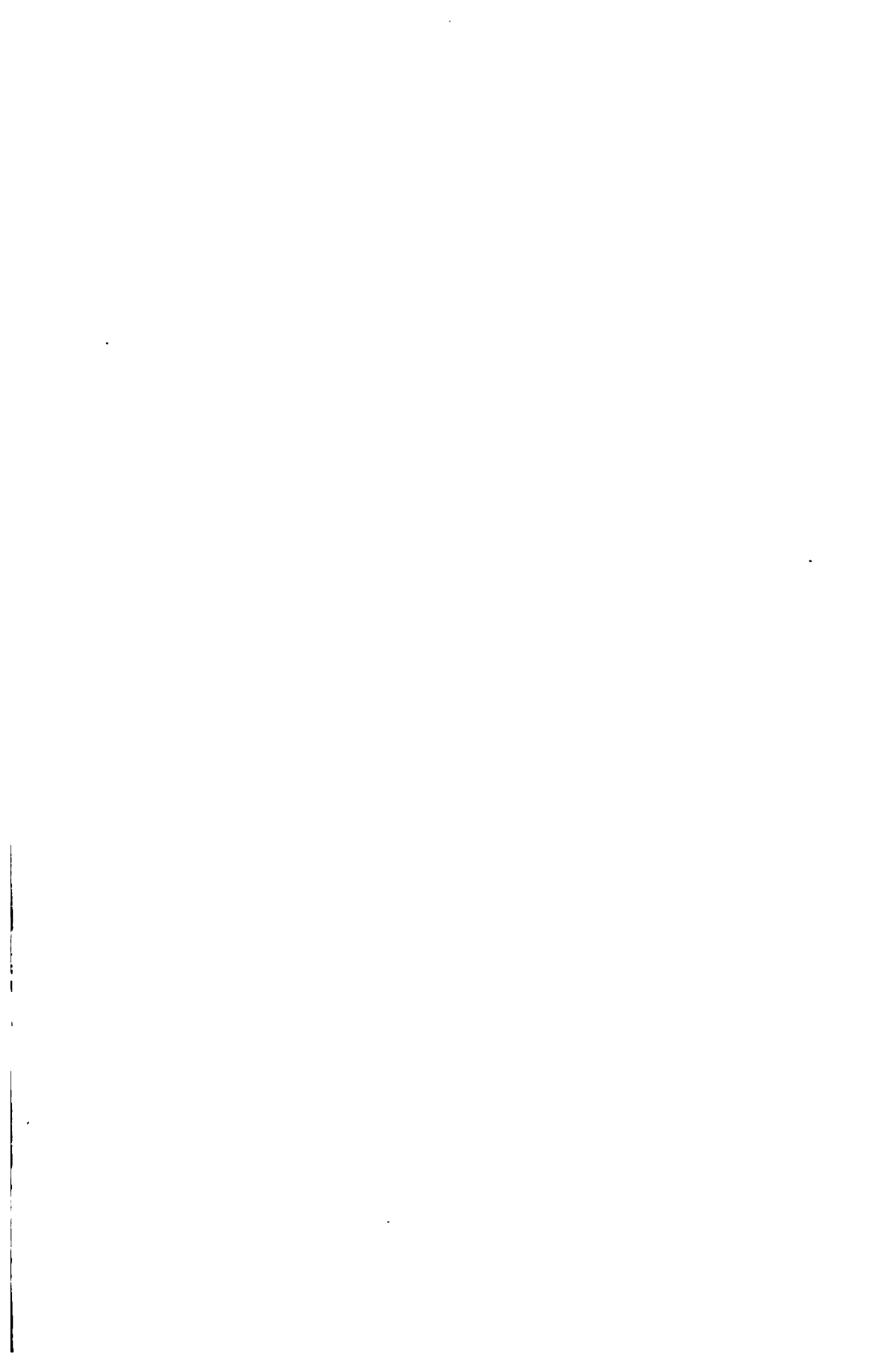
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